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# VILLANOVA LAW REVIEW

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## The Eighth Annual John F. Scarpa Conference on Law, Politics, and Culture

### Exploring and Celebrating the Legacy of the Honorable John T. Noonan, Jr.

JUDGE JOHN T. NOONAN, JR.: AN INTRODUCTION

PATRICK MCKINLEY BRENNAN\*

**F**EW in the room will know what a prize it is for any recent law school graduate to spend a year clerking for a federal judge, a person vested with the “judicial power” of the United States. A federal judicial clerkship is the brass ring, a prize that eludes even many distinguished graduates of the most elite law schools. In modest hope of such a prize and opportunity, and following the customary practice, in the middle of my second year in law school I sent out a stack of applications to federal trial judges and federal appellate judges all across the country.

In a display of either pride or humility (I’m still not sure which it was), I wrote in my application to Judge Noonan that he was my *first choice in the nation*. I meant that. I did not yet know Judge Noonan personally, but his legendary scholarship had recently been the object of my admiring study as a graduate student in the Pontifical Institute of Mediaeval Studies in Toronto, and I had subsequently applied to serve as his research assistant—a job I didn’t get—when, in the fall of 1990, I arrived to start law school at U.C. Berkeley, where he continued to teach after entering upon judicial service in 1986. I sensed from Noonan’s many writings across vast and varied terrains of great interest that there was no federal judge I could learn more from as a clerk, and it turned out that I was correct about that, though in some ways that I never could have anticipated.

Well, after an interval of a week or ten days, which seemed forever, I received a call from Judge Noonan’s chambers offering me an interview. I

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was elated, of course, though realistic enough to recognize that I was undoubtedly one among many more interviewees than the judge could hire (Circuit judges ordinarily are allowed three clerks). At the suggestion of the Judge's assistant, we scheduled the interview for some ten days later. That was, I think, a Monday. So far, so good.

The following afternoon, the phone rang. I answered it (this was long before caller ID, of course) and was astonished to hear an elderly but booming voice say (and I'll never forget this): "This is Judge Stanley Weigel. You have applied to clerk in my chambers in San Francisco. I can interview you on Thursday afternoon. I will see you then." And then, hearing a click, I knew in a flash what my problem was, and there didn't seem to be any terrestrial way out of it. Stanley Weigel had been serving since his appointment by President Kennedy in 1962 and was legendary as a District Judge for brooking no compromise. Two days later, at the end of my interview with Judge Weigel, he further astonished me by offering me a clerkship in his chambers *if* I would accept it "on the spot," an unusual move for which I was utterly unprepared.

Gathering my wits or losing my mind (again I'm not sure which it was), I sputtered that I would accept "on condition" that Judge Noonan, with whom I'd already scheduled an interview, not offer me my "first choice" clerkship. I won't describe what happened next in Judge Weigel's chambers, but you can perhaps imagine my relief when a few days after my interview with Judge Noonan he called to offer me the job of a lifetime. It would have been a great honor and, I suspect, a pleasure to clerk for Judge Weigel, but the clerkship with Judge Noonan was a dream come true.

And it was, indeed, a life-changing experience, above all because I saw up-close, and learned from the example of, something approaching the Platonic Form of a Judge or what Aristotle referred to as "animate justice." Judge Noonan's chambers was free of ideology—there wasn't talk about textualism, originalism, liberalism, conservatism, etc. Judge Noonan knew the facts of every single case like the back of his hand, and he used legal method and legal reasoning to reach sound judgment. Easy questions were treated as easy, hard questions were treated as hard and susceptible of only probabilistic justification. No trace of authoritarianism lurked or threatened. Day in and day out, Judge Noonan was quietly resolving what he once famously described as "the central problem . . . of the legal enterprise[,] [ ] the relation of love to power."<sup>1</sup> This was no loose or sentimental enterprise, but rather the working out in history of the demands of the God who created human persons in His image and likeness. I shall quote at length from Judge Noonan's perhaps most memorable statement of the task as he understood it, the context being Judge

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1. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* xx (2002).

Noonan's contribution to a *Harvard Law Review* symposium studying the very different approach of Judge Richard Posner:

Love is not simply an emotion, a sentiment captured by valentines. It is the Love "that moves the sun and the other stars" that also moves Dante, who declares, "Neither Creator nor creature ever was without love." When God is said to love human beings, an emotion is not being attributed to God. Love is the "word known to all men," Joyce observes in *Ulysses*. The love that unites man and wife in matrimony is more than a sentiment. Love is a movement of the rational will seeking the good. That movement manifests two human desires, always mixed: the desire to meet the needs of one's own insufficiency and the desire to share one's goodness. The two "great commandment[s]" of Christ inculcate love. They are "the law and the prophets." It is by reflection on the promptings of love that morality begins, that the requisite human response to the human stranger—somewhat mysterious in Posner—becomes clearer. "Love, and do what you will," advises Augustine, not dispensing with distinctions and discipline but giving love its rightful place. By experience, by analogy, by more inclusive seeing, and also by argument, reasoning, and moral theorizing, morality is developed, and the great commandments become dynamic and move to realization in completeness.<sup>2</sup>

Love, and do what you will: *Dilige, et fac quod vis*.

It was a tall order, and Judge Noonan led by example. When interviewing potential clerks, Judge Noonan always warned them that, unlike in most other federal chambers, he wrote all of his own opinions. The judge wanted his clerks not to be disappointed that they would not see their own prose in the F.2d (as it was then). It was unmistakable and unexceptionable that the mind that did the judging was to be the mind that explained the judgment. Judge Noonan, moreover, insisted upon doing work that most other chambers left to staff attorneys. When a case was to be decided by a memorandum of disposition written by a Circuit staff attorney, Judge Noonan wanted to hear both sides, not just the result and its rationale. "*Audi alteram partem*," he would say. Unlike Judge Weigel, Judge Noonan did not hire on the spot at my interview, explaining instead that he wanted to give additional thought to how the candidates he had interviewed would get along with one another and his permanent staff. Judge Noonan commented memorably that he "place[d] a great premium on collegiality in the chambers," and I am grateful that he did so. What a lively place it was! There was no carbon copy of a Noonan clerk. One of my co-clerks was a *bon vivant*, the other a serious student of mediaeval history. The

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2. John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768, 1775 (1998) (alteration in original) (citations omitted).

former was tireless in finding ways to have fun when the Judge was out of the chambers, the latter spent his commute to and from the East Bay on BART reading one Noonan tome after another. The three of us got along famously, liberated by the recognition that the Judge didn't play favorites with his clerks. The three of us admired and liked one another. Judge Noonan listened to what each of us had to say about the cases, pressed us hard with acute questions, and then made up his own judicial mind.

A final vignette will encapsulate the experience of Judge Noonan the judge. One weekend, well enough into my clerkship that I foolishly felt that I was master of the ropes, I went into the chambers on a Sunday afternoon to get ahead on my work so that I could ask the Judge for a few days off to take a camping trip with some good friends. At the top of the stack of papers for which I was responsible was a set of briefs in a case that, after a couple hours of study, I thought was easy to decide. It was ranked a three, and I was sure I knew both that it wouldn't be set for oral argument and, furthermore, how the Judge and his colleagues on the panel would come out on the merits. Instead of writing an analysis for the Judge in the form of a memo, as I should have done, I wrote a Memorandum of Decision and placed it in the Judge's in-box on my way out the door late on that Sunday.

Monday afternoon, after a morning of oddly chilly relations in the chambers, Judge Noonan strode into my office, closed the door, plopped the Memorandum of Decision on my desk, and said, "Mr. Brennan, there is one Judge in this chambers, and it is not you." I had been wrong to usurp, and I knew it as soon as he said it.

The influential American jurist Ronald Dworkin once told the story of how Judge Learned Hand, another of the twentieth century's great judges, tried to teach his young clerk a similar lesson: he threw his inkwell at him. It is arguable that Dworkin failed to learn what we can imagine was the lesson intended by Hand, however, as his own jurisprudence was later constructed around an omniscient imaginary judge infamously known as Hercules. As Judge Noonan once queried, "why should this imaginary construct be used to explain the actions of real judges? It is strange to talk of Hercules when your starting point is Harry Blackmun."<sup>3</sup>

Judge Noonan's judicial practice makes unmistakable that the starting point is particular human beings and the need for them to dedicate themselves to what is *good* for the persons they affect. The good always is particular, of course, and it is discerned and pursued one step at a time, one decision at a time—the better so the more one is aware that it is the *good* that one ought to be after, the good that perfects human beings as an end. Judge Noonan's work was that of *causing good in others*, for that is what love does.

John T. Noonan, Jr.'s brilliance and erudition are apparent from afar through the printed and televised word. Those who have been privileged

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3. NOONAN, *supra* note 1, at 174.

to know the man in person, and even to work with him day by day, can testify, though, that John Noonan understands and shows himself to be a pilgrim in the law, but before that a pilgrim in a pilgrim Church, a Church that teaches (here in the words of Josef Pieper) that “[b]eing created by God actually does not suffice . . . the fact of creation needs continuation and perfection by the creative power of human love.”<sup>4</sup> In the shadow of Judge John T. Noonan, Jr., at work in the law, one can see how in fact, quietly but certainly, “the great commandments become dynamic and move to realization in completeness.”

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4. JOSEF PIEPER, FAITH, HOPE, LOVE 174 (1997).



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JUDGE JOHN T. NOONAN, JR.: AN INTRODUCTION

WILLIAM CARDINAL LEVADA\*

THE John F. Scarpa Conference on Law, Politics, and Culture has taken for today's subject the writings of Judge John T. Noonan, Jr., who continues to serve as a senior judge for the Ninth Circuit on the United States Court of Appeals. He has written widely on jurisprudence, legal history and ethics, and church law. He has paid special attention to questions where law and morals converge. As a Catholic jurist, he has throughout his career been known as a firm and consistent opponent of legalized abortion, for which I express today my personal gratitude, and on behalf of our Church community and so many of his fellow Americans. Noonan has developed a life-long interest—as his many books and articles attest—in the history of the Church's moral doctrines. This Conference has been tasked in particular to look at his broad contributions, with a special emphasis on the “thread that unites all of [Noonan's] work—the development of doctrine.”<sup>1</sup>

I am very pleased to have this opportunity to provide a brief introduction to John Noonan to begin our Conference. I had become acquainted with some of John's books during my own theological studies, and I was very pleased to have many opportunities, especially during my years as Archbishop of San Francisco, to share meals and conversations with John and his wife Mary Lee, either at their home in Berkeley or on my side of the Bay. With you, I regret that his health did not permit him to come to Philadelphia to be with us today.

Kevin Starr, prolific historian of the State of California and its distinguished citizens, introduced a piece on John Noonan some years ago with these words:

Philosopher, theologian, historian, and poet, Noonan has been, first and foremost, a scholar of the law. . . . [T]he law, so seemingly complete in itself as a system of thought and expression, is an essential branch of general literature. A science, however inexact, the law is a humanistic pursuit as well, and no one in the past four decades has pursued the law with such humanistic fervor—a humanism enlivened by religion—as John Noonan.<sup>2</sup>

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\* Prefect Emeritus of the Congregation for the Doctrine of the Faith, The Holy See.

1. See Press Release, The Eighth-Annual John F. Scarpa Conference on Law, Politics, and Culture: Exploring and Celebrating the Legacy of The Honorable John T. Noonan, Jr., VILLANOVA UNIV. SCH. OF LAW (Oct. 24, 2013), <http://www1.villanova.edu/villanova/law/newsroom/pressreleases/2013/1024.html>.

2. Kevin Starr, *Judge John T. Noonan, Jr.: A Brief Biography*, 11 J.L. & RELIGION 151, 151 (1995).



John Noonan grew up in Boston, with his brother Jim and his sister Marie. His lawyer father is fondly remembered for his love of Shakespeare and literature in general, and in such an environment John developed early on his life-long love of faith, politics, and literature. Throughout his life, John has been known to entertain guests by inviting them to join in reciting plays, which he or they would select. He and Mary Lee have long enjoyed the custom of John reading to her from his latest literary discovery while dinner was being prepared! In his latest book, *Shakespeare's Spiritual Sonnets*, John fulfills a life-long fascination, showing in these sonnets the testimony of Shakespeare's Catholic faith shining through in a time of profound religious and political change.

Always a precocious student, John entered Harvard University as an undergraduate in the middle of his senior year of high school. By studying both during normal semesters and also summers, he graduated *summa cum laude* at the age of nineteen with a major in English literature, whose study he continued in a post-graduate year in England at St. John's College, Cambridge.

In an autobiographical section of his 1998 book *The Lustre of Our Country: The American Experience of Religious Freedom*, he says his studies abroad "confirmed what I already felt in my bones, that Catholicism was the largest intellectual force in my life, yet I knew so little about it."<sup>3</sup> John decided to enroll in the Catholic University of America in Catholic studies and canon law, receiving there his M.A. and Ph.D. John then returned to Harvard Law School, where he received his LL.B. in 1954.

John began his legal career in his father's firm in Boston. In 1960, he was invited by Fr. Ted Hesburgh to join the faculty of the University of Notre Dame Law School. In 1967, John and Mary Lee began their married life in California, their home ever since, where John became Professor of Law at the University of California, Berkeley. UC Berkeley had acquired a vast canon law library, and John was the perfect fit. In 1985, President Reagan appointed him judge in the United States Court of Appeals for the Ninth Circuit.

As a professor, Noonan has had many occasions to reflect on the judge's role in society. He calls "judging" a unique function: "It is not very much like farming, banking, woodworking, or football. It is not much closer to the legal activities which have schooled the lawyer who becomes a judge, not much like counseling clients, trying a case, or even teaching law."<sup>4</sup> In his view, "[j]udging, being unique, has unique responsibilities."<sup>5</sup> He has even dared to compare the role of judge to God, the Supreme

3. JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 25 (1998) [hereinafter *THE LUSTRE OF OUR COUNTRY*].

4. John T. Noonan, Jr. & Kenneth I. Winston, *Preface* to *THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS*, at xiv (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993).

5. *Id.*

Judge. According to Noonan, “[o]nly at this very high level did it seem possible to attain the incorruptibility, the unchangeability, and the impartiality that human beings believed that judges should have.”<sup>6</sup>

Today we honor Judge Noonan, among his other accomplishments, for the high ethical standard he has set for himself throughout his long career. Such standards are one of the principal reasons why the judiciary of the United States enjoys prestige and respect worldwide.

In his 2005 book *A Church That Can and Cannot Change: The Development of Catholic Moral Teaching*, Noonan sought to pull together results of the research and insights he had gained in exploring the history of several of the Church’s moral teachings, going back to apostolic times: on usury and bribery, on abortion and contraception, on marriage and annulment, and on religious freedom. On the last question, for example, he states, “John Courtney Murray, whose teaching on religious freedom was now vindicated, commented as the [Second Vatican] [C]ouncil ended its third session, ‘Development of doctrine is *the* issue underlying all the issues at the council.’ The promulgation of [the Decree] *Dignitatis [humanae] personae* was a triumph of development.”<sup>7</sup> In an earlier comment, he had acknowledged personally, “I grew up in a church that formally denied free exercise and live now in the same church that has come to champion it.”<sup>8</sup>

For students of theology, since the nineteenth century, the idea of the development of doctrine is no longer a novelty. In our courses on Christology and on Trinity at the Gregorian University in Rome, for example, Jesuit Fr. Bernard Lonergan spent the first half of each course examining the history of the developments that led to the defined doctrines contained in the Nicene Creed and in the decrees of the Council of Chalcedon in the fourth and fifth centuries. In dogmatic theology, the place of positive, historical theology was taken for granted. But in my undergraduate courses in moral theology in those years just before the Second Vatican Council, there was no corresponding historical approach in the teaching of moral theology.

I say this to emphasize the originality of the contribution John Noonan has made in his studies. He has not written works of moral theology as such; instead, he has raised the questions about how and why some moral teachings do develop, for example, the development of teaching on religious freedom, or on slavery, which for Noonan is the “prime case” in the development of moral doctrine. Of course, anyone could pose the questions about how and why. What is distinctive in Noonan’s work is the vast research that illustrates the often complex, sometimes surprising path that development has taken, making each case unique and defying any attempt to provide a “guide” to the development of doctrine.

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6. *Id.*

7. JOHN T. NOONAN, JR., *A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL TEACHING* 157 (2005).

8. *THE LUSTRE OF OUR COUNTRY*, *supra* note 3, at 3.

Although Blessed John Henry Newman is not (yet) a doctor of the Church, nor a “canonized” saint, he still is recognized as the intellectual “patron saint” of the development of doctrine. It hardly seems a coincidence, then, to find in the first chapter of *A Church That Can and Cannot Change* a juxtaposition of Newman and Pope John Paul II on the question of whether slavery can be called intrinsically evil. Noonan’s ultimate “rule of faith” in discerning true development is summed up in the words of St. Paul’s Letter to the Philippians: “That your love abound more and more in knowledge and insight of every kind to help you determine what is best . . . .”<sup>9</sup> In such a “rule,” we can see how Noonan’s focus on the Church’s teaching of morals in every age highlights her new ways of presenting the great commandment of love taught by Jesus, pointing faithful Christians to the human dignity of every person, as well as to the common good of humanity.

Ian Ker, Newman’s biographer, calls the last of Newman’s Oxford Sermons his most brilliant; it contains the seed that he will develop further in his classic of theological literature *The Development of Christian Doctrine*. In this 1843 sermon, Ker writes:

Taking as his text ‘Mary kept all these things, and pondered them in her heart’, Newman points to the Virgin Mary as ‘our pattern of Faith, both in the reception and in the study of Divine Truth. She does not think it enough to accept, she dwells upon it . . . not enough to assent, she develops it.’<sup>10</sup>

I don’t suppose that finding the “rule” for the development of doctrine in Philippians *and* in Luke 2:51 would be a problem either for Newman or for Noonan.

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9. *Philippians* 1:9–10.

10. IAN KER, JOHN HENRY NEWMAN: A BIOGRAPHY 266 (1988) (alteration in original).

SEVEN TEACHERS IN THE TRADITION

JOHN T. NOONAN, JR.\*

ON this auspicious occasion I should like to acknowledge and commemorate seven persons who gave me a sense of the scope, complexities, and difficulties of the Catholic intellectual tradition—the tradition of attempting to understand, to apply and to develop what is conveyed to believers by the teaching of the Catholic Church.

In 1947, I had graduated in English from Harvard and had pursued English studies at Cambridge University. I had read Étienne Gilson's *The Unity of Philosophical Experience* and known enough Latin to dip into theological manuals. But any formal instruction in Catholicism had ended at seventeen. On this subject—my beliefs as a Catholic—I was scarcely beyond the level of high school. I was actively conscious of the gap between my education in English and my education in the intellectual tradition of the Church.

I was advised by my professors at Harvard that there were three places I might supply this deficiency: Louvain, Toronto, or Washington. Louvain seemed too distant; Toronto, meaning the Institute of Medieval Studies, seemed too narrow. I chose Washington, which meant The Catholic University of America and its School of Philosophy.

There was a difficulty, however. I couldn't enter on a graduate program in philosophy without ever having had a course in philosophy. An alternative suggested itself, inspired no doubt by my experience of tutorials at Cambridge. Why not engage tutors at Catholic University to instruct me in the areas, not just philosophy, that bore on the Catholic intellectual tradition?

Three of these tutors I commemorate today. Two were priests, who would accept no remuneration for their work. One was a layman with a family to support, and I paid him a modest stipend. My father was its source, as he was for my living expenses, so that I devoted all my energies to this new area of study.

With Vincent Smith, I began the reading of the *Summa Theologiae* of Thomas Aquinas. It was like being thrown into a bath of very cold water. I had never read anything like it before. What a way to present an argument, to put the objections first! As the objections were often strongly stated, they caught one's mind and held it.

Smith was a wonderful teacher. He let me assail him with the objections. Never dogmatically, always quietly reasonable, Smith replied. No doubt I was open to persuasion. What struck me most about Smith was that he took philosophical principles seriously. They were not catchwords,

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\* United States Circuit Judge, United States Court of Appeals for the Ninth Circuit.

not mere academic formulas. They were truths that he had incorporated into his mind, truths by which he lived. He was not simply a professor of philosophy. He was a philosopher. I learned something from the *Summa*. I learned very much more from Vincent Smith.

Commemorating him today, I cannot refrain from recalling my last encounter with him. I had gone on to practice law and he had become a faculty member at St. John's University in New York. For reasons now obscure, the University had discharged thirty-one of its faculty. I was asked by the Association of American University Professors (AAUP) to investigate. I did and found flagrant actions by the administration that led to sanctions by the AAUP. In the course of my investigation, an unexpected witness was Vincent Smith. He was not one of the thirty-one fired faculty. He had resigned to protest the firings. For a man with a family to feed, it was a courageous action, animated by principles that were part of Vincent Smith's being.

Edward Arbez, the second of my tutors, was a Frenchman, born in 1881. At an early age, he had entered on studies for the priesthood, and he had become a Sulpician, or a member of the congregation of St. Sulpice, devoted to the education of priests. He had committed himself to the study of Scripture, surviving although regretting the strictures placed on Catholic exegetes in the exaggerated official reaction to the Modernist heresy. He was a co-founder of the Catholic Biblical Association and a guide to the new era of scriptural scholarship following the encyclical *Divino Afflante Spiritu* in 1943.

I began the study of Scripture with Arbez. I was familiar, of course, with the excerpts from the Gospels and the excerpts from the Epistles read at Mass. Like most Catholics at the time I was not familiar with the Bible as a whole. The Evangelicals put us to shame. The idea of picking up the Bible and reading it had not occurred to me. When I read biblical texts at Sunday Mass, I understood them as they were expounded by the Sunday homilist—then, as now, with a remarkable degree of literalism.

Arbez gently introduced me to a different approach. I do not remember now what I read with him. I do recall that at times I was a ferocious literalist. For example, as to the reference in 1 Kings 10:22 to "ships of Tarshish," I wanted to know if Tarshish was really a seaport. With questions of this sort I probed the texts for literal accuracy. Arbez was never dogmatic, never unresponsive. He led me to new comprehensions of the large variety of communications conveyed by Scripture. The divine breath had breathed on many tongues and pens. The word of God had not dropped from the sky. Scriptural communications came with contexts, histories, stylistic idiosyncrasies, linguistic innovations. You could not pick up the Bible and read it like a newspaper. Scripture was charged.

The third of my teachers at this time was a theologian Edmund Darvil Benard, a priest of the diocese of Springfield, Massachusetts and a graduate of Le Grande Séminarie in Montreal. Benard was deeply conscious of his American identity. He enjoyed singing *The Battle Hymn of the Republic*.

In preparing this paper, I discovered that in high school Benard was a runner-up in a national contest of students speaking on the Constitution of the United States. Despite this American identity, he had a Gallic quality, a finesse of feature and of mind, a quickness of intellect, and a resourcefulness in argument that made every argument with him exhilarating.

He taught a course at Catholic University that was, I believe, entitled “Apologetics,” and apologetics is what I undertook to study with him. The name, not very common today, suggests apology, but in its Latin root *apologia* it means “a rational defense” as in Newman’s autobiography, *Apologia pro Vita Sua*. Benard was adept in a rational defense of the doctrines of the Church.

Once more I cast myself as the questioner, the aggressive questioner, more so with him than with the other two because he enjoyed it more. I invited him out at times to dinner. He introduced me to his friend Eugene Burke, a Paulist, and sometimes I went golfing with them. Our friendship continued over the next several years as I settled into the philosophical graduate program at Catholic University.

What stands out in particular memory is a trip I took back to Washington from North Carolina, where I had been visiting John Kennedy (not the president). Benard and Burke had been on vacation, playing golf at Pinehurst. I met them by prearrangement and rode back with them. All the way, or so it seemed to my clerical companions, I argued with them about John Courtney Murray’s new argument for religious liberty. How was religious liberty for all reconcilable with the teachings of Leo XIII, of Pius IX, of Gregory XVI, not to mention the teachings and actions of medieval popes? Benard never shut off my challenges, although I think that he tired a bit on this trip of six or seven hours. “You ought to talk to Murray yourself,” he said, and I eventually did at Woodstock in Maryland. At this time, and for some time to come, I had a narrow sense of the development of doctrine.

Benard, I should add, was an authority on Newman and wrote a book about Newman. Newman’s name was scarcely unknown to me, but I should credit Benard with leading me to a greater appreciation of Newman’s range and depth as the best of all theologians writing in English.

Smith, Arbez, Benard. I turn from the special pleasure of touching on memories of my twenties to teachers I learned from later.

My fourth teacher in the tradition I met only once, but the occasion and the lesson were memorable, and I was taught in addition by his books. About 1950, I was still in graduate studies at the School of Philosophy at the Catholic University when I heard that Jacques Maritain was teaching a graduate seminar in philosophy at Princeton. Maritain was widely regarded as the preeminent Catholic philosopher in the world. I determined to attend at least one session of the seminar at Princeton and did so.

The subject of the session was “evil”, most specifically “moral evil.” How did it occur? How could it occur in a universe created and ruled by a good God? Maritain presented a view that was faithfully Thomistic: Evil was an absence of good, a failure of the will, a kind of nothingness. But why did an all-good and all-powerful God permit this kind of failure to occur? Why had God created such fallible creatures? Why did God not foresee the failures and eliminate the occasions on which the evil would arise? To questions such as these Maritain had no answer. Evil was a mystery incapable of rational explanation, a blankness of unintelligibility.

The book of Maritain’s that I most valued was entitled *The Person and the Common Good*. In it he distinguished between “the person”, that is, each human being with an end transcending this life, and what he termed “the individual”, that is, each human being considered as part of humanity with no end higher than the preservation of its life in this world. In this framework each of us was both a person and an individual. As an individual, we were properly subjected to the constraints necessary for society to function. As a person, each of us had a drive and a destiny exceeding our temporal condition and requiring respect from those shaping social controls. Recognition of the personhood of each human being did not by itself create a charter of human rights, but rather offered a perspective and possibilities for the development of such rights. It was no accident that Maritain was a key draftsman of the United Nations Charter of Human Rights and a principal mentor of Pope Paul VI.

I valued what I learned from Maritain as well as what I learned from Étienne Gilson, who came to teach for a while at Berkeley and whom I came to know and to entertain. He told me one story of how he and Maritain were given an audience by Pope Pius XII. The audience went on for over an hour. A papal attendant then approached the pope with two large medals to be awarded the philosophers. “No, no,” the pope said. “The usual ones.”

I turn to two teachers I met at the time of the Second Vatican Council—Josef Fuchs and Bernard Häring. Both were German. Each was a member of a religious order. Fuchs was a Jesuit, Häring a Redemptorist. Each was a master of moral theology. Each I came to know at a time that the lawfulness of contraception was becoming a controversial topic in the Church.

Häring is the only theologian, or at least the only prominent moral theologian, to have published an autobiography. How essential it is to know the experiences that have shaped the moralist! Häring’s book, *Embattled Witness*, focuses on his experience as a medic drafted into the German army at the beginning of World War II. Violating army regulations that denied his priestly status, he frequently celebrated mass and heard confessions, becoming adept in disobeying obligatory rules in order to serve a higher end. At times he compromised with the military system. “Not Quite Like Christ” is the title of one chapter in which he painfully puzzles over his compromises. In sum, this slim volume affords an insight

into someone whose major work—*The Law of Christ*—was a breakthrough in Catholic moral theology.

I met Häring when he was teaching at the Alfonsiana, a graduate center. The story was told in Rome that Joseph Ratzinger had visited the school and had asked for student responses to his talk on the harmony of theology. “The harmony might be there if the trombone was not so loud,” one student volunteered. The reference to Roman interventions was unmistakable.

Häring himself was looked at with suspicion by supervisory figures in the Holy Office. “We will catch that herring,” they were reported to have said. They never did. Just as he had not always obeyed army regulations and yet escaped discipline, so Häring knew his way around ecclesiastical censorship. He still experienced a burden. Once, later in our friendship, as I was driving him from South Bend to Chicago, he told me of some of his early difficulties. In Rome under Pius XII, the most that a moralist could say about a college or high school dance was that it was not always sinful. I didn’t hesitate to tell him that in America Catholic colleges and high schools sponsored dances regularly.

In the later years of his teaching, Häring was afflicted with a disease that affected his vocal chords. He submitted to the use of a box by which his voice could be transmitted—conveying communication that was always conscientious, always acute, always kind.

Soldier in Hitler’s army and soldier of the Lord, was he carrying, as the saying goes, water on both shoulders? I was not called to judge, only to learn.

Josef Fuchs, at the time I met him, was the leading Jesuit moral theologian—an untitled position but one that carried with it an authority and influence that marked him as exceptional. His post was at the Gregoriana, “the Greg,” the Jesuit university in Rome that educated seminarians and priests from many different orders and from all parts of the world.

I encountered Fuchs in 1965 when I was invited to serve as a consultant to the papal commission on the regulation of births. The commission had been created by Pope John XXIII and enlarged by Pope Paul VI. The commission had theologians, demographers, doctors, and three couples representing the laity. I was invited to join the sessions of the commission because my book *Contraception* had just been published and contained the only history of the development of doctrine touching this topic.

The commission was housed and met at a monastery on a road leading into Rome. Awkwardly, the three wives among its members were housed separately. The meeting began early, lasted till a noon meal, then adjoined for a siesta, and resumed from 4 PM to 7 PM. The members spoke thoughtfully and candidly. When the members of the commission assembled in 1965 some of them asked, “What do they want us to recommend?” Only gradually did the conviction come to the members that they were “they.” No one was prescribing their recommendations.



It soon became clear to me that Fuchs was key. His comments were clarifying, careful, judicious. He was not partisan. He was no advocate. His mind was open to alternatives. He did not rush to judgment on issues that must have been very familiar to him.

In contrast there was another member, also a Jesuit, also a professor at the Greg. He was dogmatic in his position that the prohibition of contraception was established, binding, and immutable. When I offered the analogy of the Church's prohibition of usury and its development from its formulation in twelfth century canon law, he was prepared. At lunch, in the courtyard, he extracted from his pocket a small-size copy of the *Code of Canon Law* and opened it to the canon prohibiting usury. To a literal reader the words spoke literally. For someone conscious of the Church's own use of banks the words required interpretation. No one could have supposed that the Holy See refused to take interest on its deposits with a bank. But the inspired literalist put his trust and his argument in the words on the page.

When Fuchs joined the majority—the majority in every group, theologians, demographers, doctors, and laity—to recommend a change in the rule on contraception, it seemed that the battle was over.

The Second Vatican Council was still in session, in fact nearing the end of its fourth and final session. John Ford, a Jesuit moralist teaching at the Jesuit seminary in Weston, Massachusetts, and not a member of the commission, went to Paul VI to persuade him to add something definitive to the Council's teaching in its proclamation of *Gaudium et Spes* on the Church in the modern world. A footnote then was added referring to earlier papal condemnation of contraception. The commission was bypassed but not trumped.

In fact the work of the commission, again enlarged by the pope, continued. Only in 1968 did Paul VI issue *Humanae Vitae*, the encyclical read by American bishops as a comprehensive prohibition of contraception but not so treated by the bishops of Belgium, France, Germany, and the Netherlands.

Fuchs was a frequent visitor to the United States. I entertained him once in Berkeley. My son, John, aged about six, dragged him upstairs to see a favorite TV show, *Hogan's Heroes*, featuring American prisoners matching wits with their blundering German guards. I had thought myself that Fuchs looked like a U-Boat commander. Did John make a similar judgment? I know only that with the composure characteristic of his balanced mind Fuchs watched the show and rejoined the party. No situation, no difficulty was going to disturb his equilibrium.

Czeslaw Milosz—Chester Love in translation—was first the teacher of my wife, Mary Lee. A professor of Slavic Languages, Milosz taught a course on Dostoevsky. Dostoevsky in his novels showed some disdain for Poles and Catholics. Milosz was a Catholic and, although Lithuanian by birth, a writer of Polish. "Poles and Russians do not like each other," he has written. Nothing of this sort prevented him from a profound appreci-

ation of Dostoevsky. In his course, one great writer explored the heart of another great writer's writing.

I didn't have such an experience of Milosz as a teacher. I still would like to think of him as a teacher because eventually I met him as a neighbor in Berkeley and as a fellow parishioner of the Paulist parish of the Holy Spirit.

The first work of Milosz that I read was *The Captive Mind*, an analysis of the thinking of Polish intellectuals who conformed to Communism as it was imposed by their Soviet masters. Perhaps self-reflection played a part in its composition. Milosz himself conformed enough to be given a diplomatic assignment in America by the Communist regime in Warsaw. In his analysis I came to see how Communism had conquered by means more subtle than force.

Milosz had graduated from law school in the early 1930s, but law was not a profession he cherished. He was, above all, a poet—that is, a man for whom the precise words recording his precise thoughts or feelings were what he sought and found. Paradoxically, he wrote in Polish so what I know of his poetry is a translation. He chose his translators thoughtfully and, I believe, guided them, so that I hear his voice in what presents itself in English.

To converse with a poet—a poet of the first rank—was an education in itself. What did I learn? To value the poet as an instrument, a human instrument through whom the divine spoke, a being in every way no different from other humans but selected to transmit visions.

Milosz's first wife, Janina, I did not know before her death, but his second wife, Carol, was an American, who had been a graduate student in English at the University of North Carolina. With Carol, both Mary Lee and I were comfortable. She was a bridge to the poet. Much younger than he was, she tragically died before he did. A survivor, he had survived many losses, and he survived this loss.

I conclude with lines from one collection of his poetry, not entirely joyful but joyously entitled *Bells in Winter*. The lines come from a short poem entitled "An Hour":

Leaves glowing in the sun, zealous hum of bumble bees,  
 From afar, from somewhere beyond the river, echoes of lingering  
 voices  
 And the unhurried sounds of a hammer gave joy not only to me.  
 Before the five senses were opened, and earlier than any  
 beginning  
 They waited, ready, for all those who would call themselves  
 mortals,  
 So that they might praise, as I do, life, that is, happiness.

One might read these lines differently, but I read them as identifying life with happiness, an extraordinary affirmation by a survivor.



PEOPLE WHO ARE NOT LEGAL AND WHO ARE NOT ALIVE  
IN THE EYES OF THE LAW

RICHARD W. PAINTER\*

I. INTRODUCTION

**I**N *Persons and Masks of the Law*,<sup>1</sup> John T. Noonan, Jr. juxtaposes legal rules based upon abstract principles with the persons whose lives are affected by these legal rules. Judges and legal commentators articulate and expound upon legal rules and abstract principles, but often ignore the persons who are the subjects of the law. *Persons and Masks of the Law* addresses this imbalance by introducing the reader to the people in famous and not so famous cases, ranging from the coincidental plaintiff, Mrs. Palsgraf in 1928,<sup>2</sup> to the slaves subjected to Virginia's colonial laws.<sup>3</sup>

This Essay explores the interaction of persons with the law in two contexts. The first is a person who is considered to be “illegal” in a particular jurisdiction because he or she is not legally present in the jurisdiction. The second is a factual dispute about whether or not a person is “alive,” an issue that arises when judges try to define the boundaries of human life, both the very beginning of human life and the very end. This Essay raises questions about personhood and the law in these two contexts. This Essay's normative conclusions, however, are limited. Meaningful conclusions about what courts and lawmakers should do with respect to persons who are present in the jurisdiction but are not legally here, or about persons who may or may not yet/still be alive, requires more thoughtful consideration than space or time allows here. The question raised here is whether abstract “masks of the law” imposed by legislatures and/or by courts avoid difficult questions about persons and their legal rights and instead take the path of justice down a short cut that treats some people as if they do not exist.

II. WHEN COURTS RULE THAT PERSONS ARE NOT “LEGAL”

Sometimes the law acknowledges that a person exists, but labels that person “illegal” because he or she is not lawfully present in the jurisdiction. “Illegal immigrant” and “illegal alien” are common terms for such a person, although sometimes the person is simply said to be an “illegal.”

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1. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, & WYTHE AS MAKERS OF THE MASKS* (5th ed. 2002).

2. *See Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

3. *See NOONAN, supra* note 1, at 35–51, 142.

This shorthand phrase allows an adjective embodying the mask of illegality to become a noun describing the person, conveying the fact that our society deems other aspects of personhood in this context to be irrelevant. A different and more specific noun is ordinarily used to describe an object illegally imported into the jurisdiction or illegally manufactured in the jurisdiction, such as an illegal drug or an illegal rendition of a copyrighted movie, but an illegal person can simply be referred to as an “illegal.”

This “illegal” label—whether used as an adjective or noun—sometimes attaches to entire families of people but sometimes attaches only to fathers and/or mothers, but not to their children, or vice versa. Relationships between parents and their children and other familial ties are important for determining legal status only if the law says so, for example, if one or both of a child’s parents are citizens. If not, and if the law designates some family members as legal and others as illegal, separation may be required.<sup>4</sup>

What impact does using the word “illegal” to describe a person have on a person’s legal rights? Does our practice of deeming people “illegal” because they are illegally present in the jurisdiction invite courts to deny to these persons fundamental rights, including the right to due process?

While the Constitution does not define due process differently for persons legally and illegally present in the United States, our courts in practice do treat “illegals” differently. Consider the following account of the procedures used by federal magistrates in “Operation Streamline,” which began in 2005 as part of a “zero tolerance” policy toward illegal immigration:

Most of the new deportees passing by describe having been shackled hand and foot for the Streamline court in Tucson. Many have just spent 30 days or more at a facility in Florence, one run by Corrections Corporation of America, a private prison behemoth that jails Streamline convicts for the U.S. government. . . .

Migrants—who once would have been removed from the country through a civil-administrative process and barred from legal re-entry—now return home with a criminal record that could expose them to escalating punishment if they cross the border again to escape poverty, find work, and/or reunite with loved ones.

Streamline began as a “zero tolerance” approach to border enforcement during President George W. Bush’s administration. Before its advent in 2005, aliens apprehended by the Border Pa-

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4. Laws that compel splitting up families because of a person’s legal status are not new to our legal system; before the Emancipation Proclamation, slaves were also subjected to this experience because some were deemed to be the property of one person and some the property of another person.

trol generally were not prosecuted under existing criminal statutes. . . .

[The magistrate judge] dispenses with the men and women in his court in seven-person bursts. The defendants before him are dressed in the dirty, sweaty clothes they were captured in, their hands shackled to their waists, their ankles in fetters.

They look weary and morose. They have not had baths or showers after several days in the desert, and the funk from this forced lack of hygiene pervades the courtroom. Indeed, the wall nearest to where the remainder of the defendants are still seated is blackened with the dirt from countless bodies.

Beside each defendant in front of [the magistrate] is a lawyer, often a private attorney hired by the court for \$125 an hour under the provisions of the U.S. Criminal Justice Act, which guarantees counsel to the indigent. Some are represented by salaried federal public defenders. Each lawyer has four to six clients in a day's Streamline lineup.

[The magistrate] runs through a series of questions relayed to each migrant with the rapidity of an auctioneer, mumbling as he goes, head down.

Individually, he asks them compound questions, translated into Spanish by an interpreter and transmitted to them via headphones: Do you understand your rights and waive them to plead guilty? Are you a citizen of Mexico (or Guatemala or El Salvador), and on such-and-such a date near such-and-such a town, did you enter the United States illegally?

The answers never vary: "Sí."

Then he asks them, as a group, whether anyone has coerced them into a plea of guilty. "No," the chorus replies.

Again, they're asked, as a group, whether they are pleading guilty voluntarily because they are in fact guilty. The chorus cries, "Sí."

First-timers receive time served for the petty offense of illegal entry.

Those charged with illegal reentry, a felony, plead guilty to the lesser offense of illegal entry and get anywhere from 30 to 180 days. . . .

However, in December 2009, the Ninth U.S. Circuit Court of Appeals found in *U.S. vs. Roblero-Solis* that Streamline hearings violated Rule 11 of the Federal Rules of Criminal Procedure, [requiring] that judges "must address the defendant personally

in open court” and determine whether the defendant’s guilty plea and waiver of rights is voluntary. . . .

The Ninth Circuit did not tackle constitutional issues, leaving it up to magistrates as to how they should proceed. Nevertheless, the Ninth Circuit made clear that it frowned upon magistrates taking pleas *en masse*, which was occurring prior to *Roblero-Solis*.<sup>5</sup>

The opinion referenced in this news article, *United States v. Roblero-Solis*,<sup>6</sup> was written by Judge Noonan. Marginal improvements have resulted in the due process rights of accused illegal immigrants, but these cases continue to be dispensed with very quickly and with minimal due process.

John Noonan has addressed this problem in both his scholarship<sup>7</sup> and in written opinions on the Ninth Circuit.<sup>8</sup> Noonan acknowledges that the law sometimes requires that a person who is here illegally be deported, usually to return to the country from which he or she came. However, Noonan also recognizes that when a judge makes such a decision about a person, that person is entitled to the same due process rights as other persons who are parties to civil or criminal cases in our courts.<sup>9</sup>

By embracing political principles that deem a person to be “illegal” because that person is illegally present in the country, our society perhaps invites such due process abuses. We fail to recognize that these cases involve parties who are persons—a fact that does not change because these persons are accused of doing something illegal, usually the act of entering the country without permission and sometimes other illegal acts as well.

Ironically, we got to this point incrementally; the law has not always been this way. Many of our ancestors came to America without permission from the people who were already here. The Mayflower passengers in 1620 were among the earliest of these immigrants, but there were tens of thousands more. The Mayflower passengers left their home country illegally (they did not get permission to emigrate from England), and went to another country (Holland), where they obtained a ship and sailed to America. They did not know if they would be welcome. They did not ask permission to come. They simply came.

The Americans who were already here could have killed the Mayflower passengers, or they could have detained them and sent them

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5. Stephen Lemons, *Grinding Justice: Operation Streamline Costs Millions, Tramples the Constitution, Treats Migrants like Cattle, and Doesn’t Work*, PHOENIX NEWTIMES (Oct. 21, 2010), <http://www.phoenixnewtimes.com/2010-10-21/news/grinding-justice-operation-streamline-costs-millions-tramples-the-constitution-treats-migrants-like-cattle-and-doesn-t-work/>, cited in JOHN T. NOONAN, JR. & RICHARD W. PAINTER, *PERSONAL AND PROFESSIONAL RESPONSIBILITIES OF THE LAWYER* 658–60 (3d ed. 2011).

6. 588 F.3d 692 (9th Cir. 2009).

7. See, e.g., John T. Noonan, Jr., *Immigration Law 2006*, 55 CATH. U. L. REV. 905 (2006).

8. See, e.g., *Roblero-Solis*, 588 F.3d 692.

9. See generally *id.*

back to England. Or, they could have welcomed them to America and taught them how to support themselves here. These Americans—sometimes referred to as “Indians” or “Native Americans”—apparently chose the latter course of action, a choice we are reminded of each year when we celebrate Thanksgiving.<sup>10</sup> Descendants of the Mayflower passengers now number in the hundreds of thousands, and some have joined a society that honors the memory of these pilgrims and the Native Americans who helped them.<sup>11</sup>

Many subsequent waves of immigrants came to America, and some did not fare so well with Americans who were already here. Altercations sometimes broke out, with violence on both sides. King Philip’s War was one of the most noted early conflicts in Massachusetts.<sup>12</sup> The immigration story in America is a complex one. Fear, prejudice, and violence sometimes predominate, while at other times, new immigrants make a genuine effort to integrate themselves into the existing order of society, and that society makes a genuine effort to accept the immigrants. For more than a century, however, all of this took place in the absence of federal laws imposing meaningful restrictions on who did and did not have a legal right to be here.

By the latter half of the nineteenth century, the United States embarked on a concerted effort to regulate and limit the flow of new immigrants to its shores.<sup>13</sup> Although our population is not as dense as those of other major world powers, including China, India, and the European Union, these laws presumably assume that we can accommodate only a

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10. The comedian and entertainer Will Rogers, himself of Cherokee descent, once jokingly suggested that the Native Americans in this instance should have taken a harsher stance against immigration:

ROGERS: Well, I think I am, folks Indian. Both mother and father had Cherokee in their blood in them born and raised in the Indian Territory. Course I’m not one of these Americans whose ancestors come over on the Mayflower, but eh, we met them at the boat when they landed. It’s always been to the everlasting discredit of the Indian race that we ever let them land. What, it’s the only thing I blame the Indians for, the biggest bonehead they ever pulled . . .

CAL. STATE PARKS, *Video Transcript, Will Rogers: American*, <http://www.parks.ca.gov/pages/735/files/willrogersorientation.pdf> (last visited July 31, 2014) (alteration in original).

11. See MASS. SOC’Y OF MAYFLOWER DESCENDANTS, *Scholarships from the Society*, <http://www.massmayflower.org/membership/benefits/scholarships/scholarships.htm> (last visited July 31, 2014) (announcing scholarship applications for Wampanoag Nation descendants in honor of that tribes’ assistance to Mayflower passengers and requiring “proof of membership in the Wampanoag Nation by a tribal official’s certification that the applicant is a *bona fide* member of a Tribe of the Wampanoag Nation” for scholarship eligibility purposes).

12. See generally JILL LEPORE, *THE NAME OF WAR: KING PHILIP’S WAR AND THE ORIGINS OF AMERICAN IDENTITY* (2009).

13. See The Geary Act, ch. 60, §§ 2–9, 27 Stat. 25 (1892); The Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214 (current version at 8 U.S.C. §§ 1551–1574 (2012)); The Chinese Exclusion Act, ch. 126, § 1, 22 Stat. 58 (1882) (repealed 1943); The Page Act, ch. 141, 18 Stat. 477 (1875) (repealed 1943).



limited number of new immigrants and that we need to enforce these limits. We have to varying degrees and in various ways enforced these laws, at one point sending boatloads of Jewish refugees back to Nazi Germany to face extermination because America did not choose to make room for them.<sup>14</sup> Immigrants who were allowed to come from, among other places, Ireland, Italy, Germany, Russia, China, and Japan, often faced prejudice upon arrival and occasionally violence from those who were already settled here. The law sometimes offered relief, but at other times stood idle or was prejudiced against immigrants, even if that prejudice resulted in the taking of human life<sup>15</sup> or the internment of people without trial, including U.S. Citizens, simply because of their ancestry.<sup>16</sup>

Like the Pilgrims who came before them, millions of people still come to the United States, some without permission. However, many new Americans today are deemed to be here illegally because their act of entering the country without permission violated a specific provision of the United States Code. They are “illegal” persons.

Judges should recognize that these immigrants are persons rather than nonentities hidden behind the mask of illegality and should allow these immigrants the same due process rights as other persons in their courts. There is, however, little else that judicial officers can do to address the situation. A broken immigration system created by federal statutes invites both unauthorized immigration to the United States and mass processing of cases against persons accused of coming here illegally. Presidents Bush and Obama have urged Congress to fix our immigration system,<sup>17</sup> but Congress has so far done nothing. Giving people hope—substantial and meaningful hope—of being permitted to come to the United States legally and to work here legally is a necessary part of any reform that would reduce the number of people who enter the country illegally. Reduced illegal immigration would lighten our courts’ immigration caseloads and perhaps allow meaningful attention to the concerns

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14. See SARAH A. OGIIVIE & SCOTT MILLER, REFUGE DENIED: THE ST. LOUIS PASSENGERS AND THE HOLOCAUST 105–06 (2010).

15. See *Commonwealth v. Sacco*, 255 Mass. 369 (1926); see also NOONAN & PAINTER, *supra* note 5, at 619–49 (discussing trial transcript).

“I met Judge Thayer once. This too was some years after the trial. We were in his chambers in Boston settling an automobile accident case . . . I realized that Judge Thayer was no longer talking about our case, but strutting up and down and boasting that he had been fortunate enough to be on the bench when those sons of bitches had been convicted.”  
*Id.* at 564 (quoting Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951)) (excerpting Charles Curtis’s account of his later meeting with Judge that presided over *Sacco* trial).

16. See *Toyoaburo Korematsu v. United States*, 323 U.S. 214, 223 (1944) (holding that internment of persons of Japanese ancestry during World War II was constitutionally valid).

17. President Bush and President Obama have proposed numerous bills during their administrations.

Judge Noonan and others have raised about fundamental due process rights.

Our present immigration system is a grave threat to the rule of law in our country, not because people emigrate without permission, as many have done before them, but because the immigration system has become so chaotic that our judicial officers cannot enforce the law without violating constitutional rights. Our present immigration system is also a threat to our national identity, which embraces—with conviction, even if sporadically in practice—substantive and procedural rights of persons in their relationship with the state, individual rights often described by the word “freedom”. We also embrace the concept of America being a nation of many cultures, and the custom of welcoming immigrants goes back to the days of the Mayflower. These are the reasons so many people want to live here. Making our immigration system conform to the traditional values of our Country is a critically important task and a task that ultimately can only be accomplished by the President and Congress.

### III. WHEN COURTS SAY PERSONS ARE NOT ALIVE

Judges sometimes must decide if a live person exists in a particular case. In the temporal realm as we know it, human life has a beginning and an end, or at least the law assumes as much (there is no secular legal recognition of the concept of “eternal life”). Courts struggle, however, to discern the beginning of human life as well as to discern the end of human life. To make these distinctions, courts sometimes look to abstract principles and legal rules that higher courts previously articulated for defining the span of human life. Alternatively, as Judge Noonan’s scholarship suggests would be preferable, at least when possible, courts could make findings of fact about whether there is a live human being in each particular case in which a party alleges that the case concerns the interests of a live human being.

One risk of allowing abstract legal principles to define human life is that courts can apply the prevailing principles of the day and decide that a being is not fully “human” or is not fully “alive,” even if faced with overwhelming evidence of a live human being. Legal principles are thus allowed to constrict that person’s existence in the eyes of the law. The person is deemed not to be a person or only partially a person, having some legal rights, but not others, presumably because some abstract principle requires it. Judge Noonan wrote about just such a legal regime in his account of colonial Virginia’s laws with respect to slaves.<sup>18</sup> The abstract principles applied in these instances may be designed to protect another person’s actual or perceived legal rights (in Judge Noonan’s example, the rights of the slave holder) and/or to prevent the political crisis that could result if the other person’s “rights” are threatened. These abstract legal principles, however, have little to do with the facts.

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18. See NOONAN, *supra* note 1, at 35–51, 142.

The Supreme Court in *Dred Scott v. Sandford*<sup>19</sup> thus weighed the legal rights of slaves against the claimed property rights of slave owners. Because the Court did not recognize slaves to fully be persons under the law, it found in the slave holders' favor. This result was overturned by a bloody Civil War and the Thirteenth Amendment to the Constitution, but the decision was grounded in the Court allowing abstract legal principles, including principles embodied in the Constitution at the time, to be the basis for factual assumptions about human beings. The Court knew there was no such thing as "three-fifths" a person in the real world, but it nonetheless followed an abstract legal principle that a slave was barely half a person.

Nearly 120 years later, the Court in *Roe v. Wade*<sup>20</sup> faced a situation that was much more difficult to decide: whether or not a human life worthy of protection under the law is taken away by an abortion. Specifically, the legal question in *Roe* was whether or not there existed a compelling state interest in prohibiting abortion that overrides the privacy rights of the mother. This legal question turns in large part on a factual question of whether the aborted fetus is a live human being. The Court discussed this question at length, relying on abstract legal principles—some dating back to Greek and Roman law—and also on then-modern medical facts related to fetal development during the first six months of gestation.<sup>21</sup> In concluding, the Court articulated a legal principle that defined the beginning of human life, or at least human life worthy of protection by the law, drawing the line at three months.

"End of life" situations are another category of cases in which a court may decide whether an alive person exists or whether a person is deceased in-fact (these definition-of-death cases are different from the "right to die" cases in which it is acknowledged that a person is alive and steps are taken to end that life at that person's direction or the direction of another). In definition-of-death cases,<sup>22</sup> courts decide when a person who once existed no longer exists, either because they have disappeared or because their bodily and mental functions have eroded to a point where a person is deemed to be dead. Once again, abstract legal principles could determine the outcome of these cases regardless of the actual facts—saying that a person is "legally dead" or "legally alive" regardless of whether the person

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19. 60 U.S. 393, 427 (1856).

20. 410 U.S. 113 (1973).

21. *See id.* at 160–61 ("The Aristotelian theory of 'mediate animation,' . . . continued to be official Roman Catholic dogma until the 19th century, despite opposition to this 'ensoulment' theory from those in the Church who would recognize the existence of life from the moment of conception."); *see also id.* at 160, 160 nn. 59–60 (discussing medical evidence on viability of fetus).

22. *See, e.g.,* *Strachan v. John F. Kennedy Mem'l Hosp.*, 109 N.J. 523, 533 (1988) (defining death related to young man's suicide attempt and doctor's subsequent diagnosis of "brain dead"); *In re Quinlan*, 70 N.J. 10 (1976) (discussing evolving definition of death regarding "brain dead" child and medical technology advancement).

is in fact dead.<sup>23</sup> Alternatively, the decision could be less grounded in abstract principles and based instead upon the facts in each case.

This distinction between abstract principles based jurisprudence and facts based jurisprudence makes a big difference in both abortion and end of life cases. Abstract legal principles defining the human life span may originate from human perceptions of factual evidence of there being life or no life in a particular instance, but after one court articulates a legal principle, others may follow it. The *Roe* Court even cited Roman law, although it did not follow it. *Stare decisis* requires courts to follow the legal principles of higher courts in their jurisdictions. By contrast, factual conclusions depend upon facts in a particular case and are not binding precedent. Indeed, what some other court decided about factual evidence—even similar factual evidence—in some other case, is usually only marginally relevant or not relevant at all in a new case involving new facts.

In situations where advances in science inform human perception of factual evidence, human perception of even very similar facts is likely to change as science changes over time. To the extent courts decide cases defining the beginning and end of the human life span based upon scientific analysis of evidence, courts' conclusions about the existence of human life in very similar factual scenarios could change.

But changes to factual assumptions and the legal rules that follow from those assumptions can have a political cost.<sup>24</sup> Particularly, if some people could have their legal rights curtailed, all three branches of government could be threatened with political turmoil when a court attempts to make what it believes to be an accurate finding of fact that diverges from what other courts have done before. Courts may choose instead not to change their decisions about a controversial fact, even if scientific evidence has changed and even if the question of fact is as important as the existence or nonexistence of a human life. A court can avoid the uncertainties of scientific analysis and instead use abstract legal principles to resolve the factual question. In countries where the Catholic Church still has great influence, the abstract principle defining the beginning of human life might be based upon the factual conclusion that human life begins at conception because the Church says so. In more secular coun-

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23. These cases turn, to varying degrees, on the factual circumstances that put certain legal principles into play, but the legal principles sometimes control the analysis at a very early stage, leading to absurd conclusions. See, e.g., John Schwartz, *Declared Legally Dead, as He Sat Before the Judge*, N.Y. TIMES (Oct. 11, 2013), [http://www.nytimes.com/2013/10/12/us/declared-legally-dead-as-he-sat-before-the-judge.html?\\_r=0](http://www.nytimes.com/2013/10/12/us/declared-legally-dead-as-he-sat-before-the-judge.html?_r=0) (reporting case of Donald Miller, Jr., Ohio man who went missing for several years, was declared dead, and then later re-emerged, appearing at court where Hancock County Court still declared Mr. Miller to be dead for Social Security purposes). This man was still legally dead even if he could stand before the Court and make it obvious to everyone present that he was in fact alive! See Joseph Vining, *Reading John Noonan*, 59 VILL. L. REV. 715, 722–23 (2014).

24. This cost may be substantial, even if it is not as dramatic as a civil war that the Supreme Court apparently tried to avoid with its abstract—and morally offensive—definition of personhood in *Dred Scott*.

tries such as the United States, the operative principle might be that human life—or at least viable human life—begins three months after conception because the United States Supreme Court said so in 1973 and has not announced that it has changed its mind.

Legal precedent is thus allowed to do something that precedent normally does not do, which is to control determinations of fact in subsequent cases for years or perhaps decades. This continues until the precedent is revisited by a court that is sufficiently influential, informed, and courageous to do so when and if the scientific evidence suggests that the court should make a determination of fact anew. Until then, lower courts that feel compelled to follow precedent on questions of fact simply fall into line and follow the precedent, refusing to consider evidence that might contradict it. Precedent does not account for subsequent advances in medicine and other sciences unless it is affirmed by a court that has actually considered those factors. Precedent is still precedent, nonetheless.

To what extent is the weight of opinion in the medical community in 1973, about when a human fetus becomes a human being, if there was any consensus in 1973, relevant for deciding that same question of fact in a case forty-one years later in 2014? The answer to this question is that the view of the medical community in 1973, which influenced the opinion in *Roe v. Wade* (it was authored by Justice Blackmun, who was the former General Counsel of the Mayo Clinic) is very relevant—and indeed far more relevant than what the medical community believes in 2014—whether or not those views have changed.<sup>25</sup> The earlier opinion is incorporated into a legal rule<sup>26</sup> that is widely believed to be binding precedent in 2014 cases. If, however, the legal rule in *Roe* is really only a factual conclusion now forty-one years old about the beginning of human life, one wonders what a judge should do with that opinion in 2014.

Judge Noonan wrote a lot on this question, mostly in the decade after *Roe* was decided<sup>27</sup> and before he joined the Court of Appeals. This author is not certain he agrees with what Judge Noonan said on that question (defining the beginning of a human life is then as now a conceptually and factually difficult task). This author, however, has serious concerns about assigning too much weight now to anyone's conclusions about that ques-

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25. This author does not express an opinion here as to whether those views in the medical community have in fact changed or whether they are likely to change in the future other than to point out the obvious: perceptions of empirical evidence are different now than they were in 1973 and will likely be yet more different in the future. Consensus about ultimate conclusions may or may not be the same.

26. See *Roe*, 410 U.S. at 116–17 (“[W]e have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man’s attitudes toward the abortion procedure over the centuries.”).

27. See, e.g., John T. Noonan, Jr., *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 1–60 (John T. Noonan, Jr. ed., 1970).

tion in the 1970s and 1980s. Facts are facts, and when human observation of facts is shaped by quickly evolving medicine and science, courts and commentators are obligated to reexamine those facts continuously to ensure to the best of their ability that these observations are correct. This is particularly true when facts concern the existence or nonexistence of a human life. No court—not even the Supreme Court—should consider itself too busy to undertake that inquiry as often as needed to make the best possible effort to get the facts right.



THE BIOGRAPHY OF GRATIAN, THE FATHER OF CANON LAW

KENNETH PENNINGTON\*

“WHO was Gratian?” asked John T. Noonan, Jr. at the beginning of his classic essay on the biography of the Father of Canon Law. He continued:

That Gratian was the author of the *Concordia discordantium canonum*; that he was a teacher at Bologna; that he was a monk; and that he was a Camaldolese are assertions made by all twentieth-century historians of canon law. That he was dead by 1159 is also often added as a fact, that his school was at the monastery of Saints Felix and Nabor is sometimes stated as certain or probable, and that he was born at Ficulle near Carraria or at Chiusi is occasionally noted as likely. An authoritative history adds that he was probably educated as a monk at Classe in Ravenna. From these statements, meager as they are, a distinct picture emerges of a scholar, bound to a particular monastic tradition, and circumscribed by particular places and dates.<sup>1</sup>

At the end of his essay and after a vigorous use of Ockham’s razor, Noonan concluded that:

[W]e have reason to believe that Gratian composed and commented upon a substantial portion of the *Concordia*. In such composition and commentary he revealed himself to be a teacher with theological knowledge and interests and a lawyer’s point of view. He worked in Bologna in the 1130s and 1140s. Beyond these conclusions, we have unverified hearsay, palpable legend, and the silent figure in the shadows of S. Marco.<sup>2</sup>

Since John Noonan’s superb historical detective work using the standard tools of criticism with admirable dexterity, we have added some very important, undoubted facts to Gratian’s biography. After Anders Winroth’s splendid discovery of an earlier recension of Gratian’s *Decretum* in the

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1. John T. Noonan, Jr., *Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law*, 35 *TRADITIO* 145, 145 (1979) [hereinafter Noonan, *Gratian Slept Here*]. Noonan also wrote a very insightful essay about *Causa* 29 in which Gratian introduced the principle “error of person,” a concept that is still an important norm in canonical marriage law (*Codex iuris canonici* c.1097 § 1). See John T. Noonan, Jr., *The Catholic Law School—A.D.1150*, 47 *CATH. U. L. REV.* 1189 (1998) [hereinafter Noonan, *Catholic Law School*].

2. Noonan, *Gratian Slept Here*, *supra* note 1, at 172.



1990s and the work of other scholars inspired by his discovery, we can also state with absolute certainty that Gratian compiled and commented on the *Decretum* in stages.<sup>3</sup> For that reason, in this Essay, I shall abandon the terminology of “Gratian I” and “Gratian II.” Referring to the stages of the *Decretum* as “Gratian I” and “Gratian II” gives a misleading picture of uniformity in how the *Decretum* evolved. Gratian and later jurists who taught and used the book never thought of it as a fixed text. They added canons to it at all stages of its evolution. In this Essay, I will use the terms pre-Vulgate and Vulgate to refer to Gratian’s great law book. By Vulgate, I mean the text that became the basic, introductory canon law text sometime around 1140, without the numerous “paleae” added later in the twelfth century.<sup>4</sup>

The research on the pre-Vulgate manuscripts has been enormously interesting and, not surprisingly, has created areas of disagreement about aspects of Gratian’s life, work, and teaching. These scholarly debates have given birth to a fruitful and vigorous exploration into the teaching and development of law in the first half of the twelfth century.<sup>5</sup> The issues are many. Perhaps the most important is the lack of consensus about how long Gratian worked on the *Decretum* and how long he taught. That will be the focus of this Essay.

To further complicate the story of Gratian, Winroth has argued that there were two Gratians. The first Gratian compiled the pre-Vulgate *Decretum* that Winroth discovered; a second “Gratian”—*persona incog-*

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3. See ANDERS WINROTH, *THE MAKING OF GRATIAN’S DECRETUM* 49 (2000); see also Melodie H. Eichbauer, *Gratian’s Decretum and the Changing Historiographical Landscape*, 11 HISTORY COMPASS 1111 (2013) (presenting most recent discussion of historiographic problems discussed in recent literature with rich bibliography). Orazio Condorelli has written the most recent biography of Gratian. See Orazio Condorelli, *Graziano*, in DIZIONARIO BIOGRAFICO DEI GIURISTI ITALIANI (XII–XX SECOLO) 1058–61 (Italo Birocchi, Ennio Cortese, Antonello Mattone & Marco Nicola Miletti eds., 2013).

4. See Peter Landau, *Gratian and the Decretum Gratiani*, in THE HISTORY OF MEDIEVAL CANON LAW IN THE CLASSICAL PERIOD, 1140–1234: FROM GRATIAN TO THE DECRETALS OF POPE GREGORY IX 22, 47–48 (Wilfried Hartmann & Kenneth Pennington eds., 2008).

5. See, e.g., Anders Winroth, *The Teaching of Law in the Twelfth Century*, in LAW AND LEARNING IN THE MIDDLE AGES: PROCEEDINGS OF THE SECOND CARLSBERG ACADEMY CONFERENCE ON MEDIEVAL LEGAL HISTORY 2005 41 (Helle Vogt & Mia Münster-Swendsen eds., 2006) (arguing that teaching of Roman and canon law did not begin until 1130s). I have presented evidence that Roman law was cited in court cases and was taught much earlier, probably as early as the traditional dates for the beginnings of the law school in Bologna, circa 1075–1100. See Kenneth Pennington, *The “Big Bang”: Roman Law in the Early Twelfth-Century*, 18 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 43 (2007) [hereinafter Pennington, *Big Bang*]; see also Kenneth Pennington, *The Beginning of Roman Law Jurisprudence and Teaching in the Twelfth Century: The Authenticæ*, 22 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 35 (2011) [hereinafter Pennington, *Roman Law Jurisprudence*]; Kenneth Pennington, *Roman Law at the Papal Curia in the Early Twelfth Century*, in CANON LAW, RELIGION, AND POLITICS: LIBER AMICORUM ROBERT SOMERVILLE 233 (Uta-Renate Blumenthal, Anders Winroth & Peter Landau eds., 2012).

nita—doubled the size of the Vulgate *Decretum* during the 1140s. There is very little evidence for his conjecture.<sup>6</sup> He was compelled to create a second Gratian because he had shrunk Gratian's teaching career to only a few years. I will examine his reasons for doing so below. My main argument for not accepting the theory that there were two Gratians is quite simple. It is difficult to imagine that if a Gratian compiled the pre-Vulgate *Decretum*, and another person doubled the size from circa 2000 canons to circa 4000, the first generation of jurists after Gratian would have not noticed or not known about the second Gratian's work and blithely attributed what was now a massive work to just "Gratian." Further, as we shall see, the additional canons were not added in one fell swoop, but over time. Gratian may have had an atelier of assistants, but it seems unlikely that another completely unknown person would step in to complete the Vulgate *Decretum* with not only many canons but also dicta which all the later jurists recognized as Gratian's.

The main reason that Winroth created a second "Gratian" is because of a text that is found in all the pre-Vulgate manuscripts. At D.63 d.p.c.34 Gratian cited a papal conciliar canon. The passage is contained in all pre-Vulgate manuscripts and also in the Vulgate *Decretum*:

Nunc autem sicut electio summi pontificis non a cardinalibus tantum, immo et<sup>a</sup> ab aliis religiosis clericis<sup>b</sup> auctoritate Nicolai papae est facienda, sic<sup>c</sup> episcoporum electio<sup>d</sup> non a canonicis tantum, set<sup>e</sup> ab aliis religiosis clericis, sicut in generalif synodo<sup>g</sup> Innocentii pape Rome<sup>h</sup> habita constitutum est.<sup>i</sup>

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<sup>a</sup> et] etiam PFdBcAa BiFsMeMIMzPd <sup>b</sup> uiris uel clericis BiPd <sup>c</sup> sic] ita et PFdBcAa BiFsMeMzPd, ita MI <sup>d</sup> lectio Bi<sup>ac</sup> set] set etiam PBcAa BiFsMeMIMzPd set etiam<sup>ac</sup>, immo etiam<sup>bc</sup> Fd<sup>f</sup> gnala<sup>ac</sup>, gnalas<sup>bc</sup> Fd <sup>g</sup> studio *add. ante synodo* Bi<sup>acg</sup> Roma Me<sup>h</sup> constitutum

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6. His main argument is that the Vulgate *Decretum* is not as well organized as the pre-Vulgate. As I have pointed out in other examples of jurists expanding their texts, their methodology of revising texts inevitably leads to a lack of clear argumentation. See Kenneth Pennington, *An Earlier Recension of Hostiensis's Lectura on the Decretals*, 17 BULL. MEDIEVAL CANON L. 77 (1987); Kenneth Pennington, *Johannes Andreae's Additiones to the Decretals of Gregory IX*, 74 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE KANONISTISCHE ABTEILUNG 328 (1988); Kenneth Pennington, *Panormitanus's Lectura on the Decretals of Gregory IX*, in FÄLSCHUNGEN IM MITTELALTER: INTERNATIONALER KONGREß DER MONUMENTA GERMANIAE HISTORICA MÜNCHEN, 16–19. SEPTEMBER 1986: GEFÄLSCHTE RECHTSTEXTE: DER BESTRAFTE FÄLSCHER 363 (1988). Winroth has also argued that Gratian changed his mind in his treatment of the marriage of unfree persons. See Anders Winroth, *Neither Free nor Slave: Theology and Law in Gratian's Thoughts on the Definition of Marriage and Unfree Persons*, in MEDIEVAL CHURCH LAW AND THE ORIGINS OF THE WESTERN LEGAL TRADITION: A TRIBUTE TO KENNETH PENNINGTON 97 (Wolfgang P. Müller & Mary E. Sommar eds., 2006). I do not find his argument convincing. There are many changes in emphasis and topics as the *Decretum* evolved. These changes are not proof that someone else made them, e.g., Gratian's treatment of Jews. See Kenneth Pennington, *The Law's Violence Against Medieval and Early Modern Jews*, 23 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 23 (2012).

est] *add. ait enim: Obeuntibus sane episcopis . . . add. Aa in textu, add. Bc in marg.*<sup>7</sup>

In translation:

Now, however, just as the election of the supreme pontiff is not made only by the cardinals but by other religious clerics, as was established by Pope Nicholas II's authority, so too not only canons of the cathedral chapter but also other religious clergy participate in the election of bishops as was established in the general synod of Pope Innocent held in Rome.

Gratian's comment is the last datable text in the pre-Vulgate manuscripts. Pope Innocent II was the bishop of Rome from 1130 to 1143. If one is convinced, as Winroth and others are, that this text can refer only to c.28 of the Second Lateran Council, then one is faced with an almost intractable problem.<sup>8</sup> In the pre-Vulgate manuscripts, this text is the only one that can be dated after circa 1125. That fact, if true, would raise the question: what was Gratian doing between circa 1125 and 1139; or to put the question differently, why would Gratian have compiled a collection of canon law in the late 1130s that ignored all the conciliar legislation and papal decretals after circa 1125; or to add further complexity, why would Gratian add this reference in 1139 to a recent council and not add the text of the canon; or even more puzzling, why did he not refer to other canons of that singularly important council in his pre-Vulgate *Decretum(s)*?

In a recent article, Atria Larson has attempted to provide a possible answer to some of those questions by arguing that, since late eleventh and early twelfth century councils generally—and Innocent II's councils in particular—repeated canons of previous councils almost word for word, one might explore the possibility that Innocent held a council in Rome before 1139 and that is the council to which Gratian referred.<sup>9</sup> Larson went on to present evidence that Innocent might have held a council in Rome in 1133, and that council could be the one that Gratian cited. Since the canons of this council are not preserved and since there is no other evidence

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7. See GRATIAN, *DECRETUM* [hereinafter *DECRETUM*]. I base the translation on St. Gall, Stiftsbibliothek 673 (Sg), 25–26 which I have collated with Paris, Bibliothèque nationale de France nov. acq. lat. 1761 (P), fol. 65va; Florence, Biblioteca nazionale centrale Conventi soppressi A.1.402 (Fd), fol. 12va.; Barcelona, Arxiu de la Corona d'Aragó, Santa Maria de Ripoll 78 (Bc), fol. 76rb; and Admont, Stiftsbibliothek, fol. 72v of the pre-Vulgate manuscripts, and with these very early Vulgate manuscripts: Biberach, Spitalarchiv B 3515 (Bi), fol. 57vb; Bremen, Universitätsbibliothek a.142 (Br), fol. sine numero; Mainz, Stadtbibliothek II.204 (Mz), fol. 44vb; Munich, Staatsbibliothek Clm 13004 (Me), fol. 78ra; and Clm 28161 (MI), fol. 53v; Paris, Bibliothèque nationale de France lat. 3884-1 (Pf), fol. 78ra, 14317, fol. 52va-vb (Pd). I have not recorded minor scribal errors here and in the text of *Obeuntibus* below.

8. See WINROTH, *supra* note 3, at 137.

9. See Atria A. Larson, *Early Stages of Gratian's Decretum and the Second Lateran Council: A Reconsideration*, 27 *BULL. MEDIEVAL CANON L.* 21, 37–39 (2007).

for it, her conjecture cannot be considered conclusive. Nonetheless, if correct, it would explain what Gratian was doing in the 1120s and early 1130s: teaching canon law in Bologna and working on his textbook. He did not finish the pre-Vulgate *Decretum* circa 1140 but rather circa 1133.

Three of the pre-Vulgate manuscripts added the text and a rubric to c.28. The Florence and Barcelona manuscripts placed the canon in the margins of their main texts. Florence also had it in the supplementary appendix at the back of the manuscript. It is striking and important that the marginal and supplemental texts of the canon in Florence are clearly from two different textual traditions and must have been added at different times. The Admont manuscript incorporated it into the body of Gratian's text:

Sicut in generali sinodo Innocentii papae Romae habita constitutum est. Ait enim: Absque religiosorum uirorum consilio canonici maioris ecclesie episcopum non eligant.<sup>a</sup> Obeuntibus<sup>b</sup> sane episcopis quoniam<sup>c</sup> ultra tres<sup>d</sup> menses uacare ecclesiam<sup>e</sup> sanctorum patrum prohibent sanctiones<sup>f</sup> sub anathemate<sup>g</sup> interdiciamus, nec<sup>h</sup> canonici de sede episcopali<sup>i</sup> ab electione episcoporum excludant religiosos uiros, set eorum consilio honesta et idonea persona<sup>j</sup> in episcopum eligatur.<sup>k</sup> Quod si<sup>l</sup> exclusis<sup>m</sup> religionis electio facta fuerit<sup>n</sup>, quod absque eorum consensu<sup>o</sup> et conuentia<sup>p</sup> factum fuerit, irritum habeatur<sup>q</sup> et uacuum.

Collated: Fd<sup>in marg.</sup> Fd<sup>in suppl.</sup> AaBc<sup>in marg.</sup> BiCdFsMeMzPdPfSa

<sup>a</sup> Absque—non eligant Fd<sup>in suppl.</sup> BcCdBiMeMzPdPfSa, om. Fd<sup>in marg.</sup> Aa<sup>b</sup> Abeuntibus Fd<sup>ac, in suppl.</sup> BcMz<sup>pc</sup> Pf<sup>c</sup> quo Aa<sup>d</sup> tres om. Aa<sup>ac</sup>, add. super lin. iii. Aa<sup>pc</sup> ecclesias COGD2<sup>f</sup> prohibent patrum sanctiones tr. COGD2 anathematis uinculo CdFsMzPd<sup>h</sup> ne Aa<sup>pc</sup>, ne Fd<sup>in suppl.</sup> BiCdFsMeMzPdPfSa COGD2<sup>i</sup> episcoporum Fd<sup>in suppl.</sup> jhonestam et idoneam personam Fd<sup>in suppl.</sup> CdMeMIMz<sup>k</sup> eligant Fd<sup>in suppl.</sup> BcCdMeMIMz<sup>l</sup> si om. Aa<sup>acm</sup> exclusis] eisdem add. COGD2<sup>n</sup> facta fuerit] fuerit celebrata COGD2, legi non potest Fd<sup>in marg.</sup>, fuerit Fs, fuerit facta tr. Pf<sup>o</sup> consensu eorum tr. Mz<sup>p</sup> conuentia Aa: continentia Fd<sup>in marg.</sup>, covenientia Sa<sup>ac</sup>, conuenientia Fd<sup>in suppl.</sup> BcBiCdFsMeMIMzPfSa<sup>pc</sup> COGD2, coniuentia Pd, var. in apparatu COGD2<sup>q</sup> habeant Fs<sup>10</sup>

10. Fd is the base text that is collated with AaBc, the manuscripts listed above in note 7, and with the text in 2.1 CONCILIORUM OECUMENICORUM GENERALIUMQUE DECRETA (Antonio García et al. eds., 2013). 113=COGD2 omits "Ait enim" of Gratian's dictum. The new edition of COD<sup>3</sup> did not introduce any changes into the text. The COGD2's reading of "conuenientia," which generally means a meeting, seems less likely than the reading in Aa, which means "consent." "Coniuentia" can be found in many twelfth century sources in contexts in which it means "consent."

In translation:

Indeed he [Innocent] says: *Without the counsel of religious men the canons of the major church may not elect a bishop.* Since the decrees of the holy fathers prohibit a church to be left vacant for more than three months, we forbid that under anathema and also that the canons of the episcopal see may not exclude religious men from the election of bishops. Rather with their counsel may an honest and worthy person be elected bishop. But if an election is carried out that excludes those religious men, because it was made without their consent and agreement, the election shall be held to be invalid and vacated.<sup>11</sup>

Although the manuscript tradition of the Second Lateran Council is rich, there has not yet been a critical edition of the canons. The text in Aa, Bc, and Fd, in other words, cannot provide a proof of its origin by comparing it to any current printed edition. Nonetheless, one significant variant in this canon gives pause. Gratian's text has "facta fuerit," whereas all twenty manuscripts containing this canon from Lateran II that Martin Brett has collated have the reading "fuerit celebrata." "Celebrare" is the verb that one would expect in a papal conciliar decree. The other textual evidence is the word "consensus" in the pre-Vulgate manuscripts instead of "assensus," in the manuscripts of Lateran II that Brett has collated. "Consensus" is juridicially more precise. These two pieces of textual evidence are not, however, a conclusive proof that Gratian's source for this text was not the Lateran II decrees, but it does introduce a modicum of doubt.<sup>12</sup>

What one may more confidently say is that the text in the three pre-Vulgate manuscripts provides further evidence that Gratian "tweaked" his pre-Vulgate *Decretum* after it began to circulate. Of the three pre-Vulgate manuscripts, Florence, Barcelona, and Admont, in which the text of *Obeuntibus* is present, in Florence and Barcelona it is a marginal addition. In Admont, however, it is inserted into the body of the *Decretum*. That does not prove that the inserted text is from Lateran II or from an earlier council, but it does lead one to the conclusion that the canons added later to the Vulgate *Decretum* circulated in stages and were not received at other law schools at one time. The evidence for that last statement is contained in the texts, margins, and appendices of pre-Vulgate manuscripts. They

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11. Translation based on Norman Tanner's with minor changes. See 1 *Decrees of the Ecumenical Councils*, NICAENA I-LATERAN V, at \*203 (Norman Tanner ed., 1990); 2 *TRENT-VATICAN II* (Norman Tanner ed., 1990).

12. My thanks to Professor Martin Brett for providing me with his preliminary edition of c.28. I am currently working on an "edition" of the canons attributed to Pope Innocent II in all the early manuscripts which will be published this year. The results to date have provided evidence that none of the canons may be attributed to Lateran II. The differences between the canons of Lateran II that Brett has edited and those that Gratian incorporated into his *Decretum* are many and significant. I will publish an edition of the canons attributed to Innocent II in the *Decretum* in the near future.

provide textual evidence that the Vulgate canons were not copied into pre-Vulgate manuscripts from complete Vulgate texts.<sup>13</sup>

There is further evidence in the pre-Vulgate manuscripts that Gratian probably never conceived of his work as a definitively finished product. In the Paris (P), Florence (Fd), and Barcelona (Bc) manuscripts, Distinctions 100 and 101 and the canons of D.99 after c.1 are missing.<sup>14</sup> In Fd, additional texts are inserted by a later hand. However, the scribe of Fd's main text may have known more Distinctions were coming because he ended D.99 c.1 with the notation "§ d.c. (Distinction 100)." The scribe of Admont (Aa) included pre-Vulgate Distinctions 100–101 in the main text. Barcelona added them on an inserted folia. The only conclusion that can be drawn from this textual evidence is that these manuscripts reflect slightly different stages of a pre-Vulgate text that circulated over a wide geographical area. There was a pre-Vulgate *Decretum* circulating with 99 Distinctions and 36 *Causae*. This version reached Northern France (P) and the Iberian Peninsula (Bc). Scribes in Italy learned of two new Distinctions (Fd), left space for them with a notation, and added them later. In Bc, the revisions of the text were handled differently. Originally, the text omitted D.100–101 completely. A folio was inserted into the manuscript at a later time, and D.100–101 of the Vulgate text were included in their entirety.<sup>15</sup> The Admont scribe had an expanded pre-Vulgate *Decretum* at hand and incorporated parts of D.100–101 into the text.<sup>16</sup> The scribe, however, excluded most of the Vulgate text.<sup>17</sup>

How much time would have elapsed for these different stages of the text to have circulated to Northern and Western Europe? Again, the evi-

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13. *Contra* WINROTH, *supra* note 3, at 130–33 ("The first recension of the *Decretum* was not a living text. It was a finished product which its author considered ready to be circulated. . . . I know of no manuscript (beyond Aa) which contains a version of the *Decretum* that is longer than the first recension but shorter than the second and that could be an intermediate stage . . ."). However, as Melodie Harris Eichbauer has demonstrated, if the canons added to Fd, Bc, and Aa were entered into the body of a new *Decretum*, it would not equal a Vulgate text. See Melodie H. Eichbauer, *From the First to the Second Recension: The Progressive Evolution of the Decretum*, 29 BULL. MEDIEVAL CANON L. 119, 150–53 (2012).

14. See DECRETUM, *supra* note 7 (Paris, Bibliothèque Nationale de France nov. acq. lat. 1761 (P), fol. 83v; Florence, Biblioteca nazionale centrale Conventi soppressi A.1.402 (Fd), fol. 18vb-19ra). Fd added the omitted texts in a hand that is similar to the other marginalia and textual corrections in the manuscript. The hand of the main text ended on fol. 18vb with the notation: "§ d.c.", i.e. "distinctio centum", which may indicate that the scribe knew that additional text would be made available. The scribe left room for the additional text. In P, the scribe left room after the last words of D.99 c.1., but the space would not have been sufficient for D.100 and 101. Winroth overlooked those omissions in his analysis. See WINROTH, *supra* note 3, at 204. In Bc, the missing texts are added on a new folio.

15. There was not enough room on folio 98r–98v for the entire text. The scribe squeezed D.100 d.p.c.8 to D.101 c.1 into the left hand margin of 98v. For a discussion on the inserted leaves in Bc, see Eichbauer, *supra* note 13, at 126–27.

16. See DECRETUM, *supra* note 7 (Aa fol. 92v-93r).

17. Admont also added D.99 c.4, 5, and D.101 c.1 to the main text of the *Decretum*.

dence does not provide us with any clues beyond the text itself. One may say, however, that the geographical spread of the manuscripts alone would dictate that the time for these texts to circulate could not have been less than a few years before they reached Northern France and the Iberian Peninsula. What was Gratian doing during those years? I would say: teaching and expanding his text in Bologna.

More can be said about the stages evident in pre-Vulgate texts. Melodie Harris Eichbauer has done a careful study of the canons that were added to the margins and to appendices in the Florence and Admont manuscripts and to the margins of Barcelona.<sup>18</sup> Winroth had concluded that these canons must have been taken from Vulgate exemplars of Gratian's text.<sup>19</sup> I was puzzled from the beginning why a jurist, institution, or scribe would go to the trouble of creating an updated text that would have been so difficult to use. Eichbauer's study revealed that the appendices could not have been drawn from a Vulgate text. The proof is in the numbers and in the fact that they were added by different scribes at different times. As it is, neither Admont nor Florence has all of the canons that Gratian added when he compiled his Vulgate text.<sup>20</sup> The numbers are not small: Admont omits eighty-seven canons and Florence sixty-two from the Vulgate.<sup>21</sup> Significantly, the omitted canons are different in each manuscript. If one puts the numbers a little differently, between the two manuscripts, circa 117 canons are missing from the Vulgate text. In percentage, circa 8% of the Vulgate's canons are not included in the margins or the appendices of these two manuscripts. These numerous omissions could not be attributed to sloppy, careless scribes. There are just too many missing canons. These numbers are the evidence for Eichbauer's conclusion that the canons added to the pre-Vulgate texts in Paris, Florence, Barcelona, and Admont must have been done in stages and over a period of time. Her evidence also points to Gratian having circulated a large bulk of the additions in one fell swoop but then having updated these additions afterwards.

There is one last powerful piece of evidence that militates against pushing the date of the Vulgate *Decretum* too far in the 1140s: the Second Lateran canons. Eichbauer's research has convinced me that Gratian did not add the canons of the Second Lateran Council in a flurry of last minute additions as scholars have previously believed. Gérard Fransen, more than fifty years ago, had argued that the Second Lateran's canons were hasty and last minute additions to the *Decretum*. At first glance, some of them, but not all, seem as if they were added without carefully integrating them into the flow of Gratian's arguments. In his study of the rubrics or

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18. See generally Eichbauer, *supra* note 13 (especially her conclusions on pages 150–52).

19. See *id.* at 123 n.12.

20. Not taking the evidence of the Barcelona manuscript into account, which would not alter the picture substantially.

21. See Eichbauer, *supra* note 13, at 145.

summaries of the canons, Titus Lenherr found textual evidence that supported Fransen's conjecture.<sup>22</sup> He charted the textual variants in the summaries and saw that they varied more frequently than was usual in *Decretum* manuscripts.

The pre-Vulgate manuscripts have confirmed that the canons were added only to the later stages of Gratian's text. However, they were not added at the last minute. Almost all of the canons attributed to Lateran II are in the margins or the appendices of the Florence and Admont manuscripts. The Florence manuscript, which is the earliest of the four pre-Vulgate manuscripts discovered by Winroth, omitted two canons attributed to Pope Innocent II completely.<sup>23</sup> One of those canons is also not to be found in Admont. The remaining canons were added to the appendices or to the margins of the pre-Vulgate manuscripts. One canon that was added to the appendix and the margin of Florence came from two different textual traditions, i.e., the text in the margin is different from the text in the supplement.<sup>24</sup> This is good evidence that the canons attributed to Lateran II were not added to the pre-Vulgate manuscripts at one time. Consequently, they cannot be texts that Gratian added in a final, rushed effort to complete the Vulgate as Lenherr has argued.

An even larger question looms over Innocent II's canons. Are they all, in fact, canons from Lateran II? In the Vulgate *Decretum*, modern scholars, but not Gratian, have attributed fifteen canons to it (out of thirty promulgated by Lateran II). Their attributions are problematic for several reasons. Canon 28 (D.63 c.35) was from the beginning identified as a canon promulgated by Innocent II in Rome but not as having been promulgated in the Lateran. Without an explicit attribution, as Atria Larson has argued, one cannot be absolutely sure it belonged to the council of 1139. I have already demonstrated above that the text of Gratian's Canon 28 has significant variants not in the manuscripts of the Lateran II's Canon 28 outside the tradition of Gratian's *Decretum*.

Another canon in the Vulgate *Decretum* combined Canons 18, 19, and 20 of the Second Lateran Council (C.23 q.8 c.32) and is identified only as having been taken from "a universal council under Innocent II," which cannot be attributed to Lateran II with any certainty.<sup>25</sup> As Larson has

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22. See Gérard Fransen, *La date du Decret de Gratien*, 51 *REVUE D'HISTOIRE ÉCCLÉSIASTIQUE* 521 (1956); Titus Lenherr, *Die Summarien zu den Texten des 2. Laterankonzils von 1139 in Gratians Dekret*, 150 *ARCHIV FÜR KATHOLISCHES KIRCHENRECHT* 528 (1981).

23. See *DECRETUM*, *supra* note 7 (referring to D.90 c.11 and C.21 q.2 c.5 of Florence manuscript, which is also omitted by Admont).

24. See *id.* (referring to D.63 c.35, Fd fol. 12va and fol. 113va.). I am completing an edition of the texts attributed to Lateran II in the pre-Vulgate and early Vulgate manuscripts.

25. Canons 18, 19, and 20 combined into one: C.23 q.8 c.32: "De incendiariis quoque Innocentius secundus in uniuersali concilio generaliter constituit dicens." *DECRETUM*, *supra* note 7. Clm 13004, fol. 228rb and 28161, fol. 195ra have the same reading. In the Biberach manuscript and Salzberg, Stiftsbibliothek a.xi.9, the



demonstrated in detail, the adjective “universalis,” when attached to synod or council, did not automatically mean what we mean today by an ecumenical council. A “concilium” called by the pope and having participants of different nationalities could be termed “universale.”<sup>26</sup> All the other canons that scholars have attributed to the Second Lateran Council have the inscription of “Innocentius II” and nothing more. Their inscriptions bear no indication that they are conciliar canons promulgated at the Lateran II or at any other council. To be sure, their texts are very close to the canons that we have accepted as products of the Second Lateran. But many of them differ significantly from the texts of Lateran II. The common repetition of wording that is characteristic of conciliar canons in this era and the lack of an explicit inscription to Lateran II in all the canons make an attribution to the council of 1139 problematic. As Martin Brett has explained to me, “there can be no argument about the extremely close resemblance between most of the canons attributed to Innocent’s councils at Clermont, Reims, Pisa and the Lateran,” which can make attributions to a particular council difficult.<sup>27</sup> At the very least, we should be cautious, therefore, about attributing some or all of these canons to the Second Lateran Council. If they are not Lateran II canons but drawn from other councils over which Innocent II presided during his pontificate, it would resolve a number of dating issues that have plagued the study of Gratian’s teaching career and his life. However, much more work has to be done on this problem before we could come to a firmer conclusion—if a firm conclusion will be possible. A preliminary edition of the canons attributed to Innocent II in the early Gratian manuscripts must be constructed from the best Vulgate manuscripts and then the results compared to Martin Brett’s edition. This task is already well underway.

There is an intriguing rubric in a very early Italian Vulgate manuscript—Florence, Biblioteca Laurenziana Plut. 1 sin. 1—that casts doubt on one text’s having been taken directly from a text of Lateran II. The rubric to C.17 q.4 c.29, that might be an edited version of Lateran II’s c.15, reads: “Item ex lib’ Innocentii pape ii.”<sup>28</sup> I have not found another early Vulgate manuscript with that rubric. Without a stronger textual tradition, I would be reluctant to conjecture what it means. Literally, the text asserts that this canon can be found in a book of Innocent II’s legislation. It does not attribute the canon to Lateran II. As I have already made clear, however, no other rubric to the canons identifies the canons as being from Lateran II. Did Gratian know a manuscript with a collection of Innocent’s legislation and take all his Innocentian canons from it? It is a tempting hypothesis but for now goes beyond the evidence.

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canon is part of Gratian’s dictum and is not separated from it. My edition of the canons has provided more evidence for the conclusion that Gratian took these canons of Pope Innocent II from non-Lateran II sources. See *supra* note 12.

26. See Larson, *supra* note 9, at 27–34.

27. Email from Martin Brett, to Author (Jan. 14, 2014) (on file with author).

28. DECRETUM, *supra* note 7 (Fs fol. 205rb).

I have postponed a discussion of the St. Gall Stiftsbibliothek 673 until now. I wanted to present the evidence for Gratian's long teaching career in Bologna from the pre-Vulgate manuscripts of which Gratian's authorship is not questioned. Scholarly opinion is unanimous that Gratian compiled the collections preserved in the pre-Vulgate manuscripts that we have discussed to this point.<sup>29</sup>

If the St. Gall text could be proven to be a version of a stage that preceded the text of the Admont, Barcelona, Florence, and Paris manuscripts, there could be little question that Gratian taught in Bologna for a long time. No scholar questions the fact that if St. Gall was an abbreviation, it is an abbreviation of pre-Vulgate *Decretum*, not the Vulgate text. I have written previously that if an abbreviator shortened Gratian's text from those manuscripts he was almost impossibly clever. He left no undisputable fingerprints. The very few places where one may argue about whether he nodded off while doing his cutting are debatable.

John Noonan and many other scholars have recognized for a very long time that Gratian's *causae* (cases) are wonderful teaching tools and were Gratian's stroke of genius.<sup>30</sup> If it were a version of an UrGratian, the St. Gall manuscript would be proof that Gratian began to teach using cases and developed a Socratic case law teaching methodology. He was the Christopher Columbus Langdell of the twelfth century. There is no question that his *Decretum* became a very popular text because of the *causae*. Its immediate acceptance as a "liber legalis" (textbook) that took its place alongside Justinian's Roman law codification in the schools all over Europe was not because the first part of the *Decretum*, the distinctions, offered exciting and compellingly teachable material. It was his *causae* that won Gratian his unique place in the history of canon law. Before the discovery of the St. Gall manuscript, one could have conjectured that he had begun teaching with the *causae*. In this context, one cannot be too surprised that St. Gall exists.

The St. Gall manuscript is not, however, a pristine UrGratian. From *Causa* 27–36, the text of the manuscript received significant interpolations and editing by unknown hands, probably not by Gratian's. Nonetheless, *Causa prima* to *Causa* 23 (*causae* 24–26 are missing) must have corresponded fairly closely to an UrGratian (remembering, however, that there is some evidence that stages preceded the St. Gall text as well).<sup>31</sup> The

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29. See WINROTH, *supra* note 3, at 175–96.

30. See, e.g., Noonan, *Catholic Law School*, *supra* note 1, at 1201 (“[Gratian showed that t]he study of law was, at least in part, the study of hypotheticals, with the power of hypotheticals to select and isolate significant legal issues and the weakness of hypotheticals that they lack the rich concreteness, the true mindbinding complexity, of real cases. The hypotheticals were the basis for questions that opened up substantial areas of law in a penetrating way. The questions also turned out to be convenient pegs on which to hang a variety of authorities.”).

31. Melodie Harris Eichbauer's careful study of the rubrics in the St. Gall manuscript demonstrates that they were not the work of an abbreviator and that additional *causae* were probably added over time to the book. See generally Melodie

additions of Roman law *authenticae* in the margins and glosses indicate that the manuscript was used in the classroom at a significant law school (Bologna?) and not one on the periphery.<sup>32</sup> The *authenticae* would not have been known to teachers of canon law outside Italy in the 1130s. Just as Rolandus—a commentator on the *Decretum* in the 1150s—had, it seems, only used the *causae* to teach his students, so too did the early Gratian.<sup>33</sup>

Where was the St. Gall manuscript produced and used? Scholars who have examined the illuminated initials have concluded that they were done in Central or Northeastern Italy in the second half of the twelfth century. The script is certainly older than that. I would date it to the middle of the twelfth century at the latest. Its provenance is Italian. The combination of its carefully prepared script and its elaborate—and quite beautiful—illuminations is proof that it was the product of a sophisticated scriptorium in Northern Italy.<sup>34</sup>

Only one piece of evidence seriously calls into doubt St. Gall's being derived from an UrGratian.<sup>35</sup> *Causa 2* in St. Gall and *Causa 1* in all the other recensions of Gratian's text dealt with the issue of simony. The case he presented was complicated to say the least. I will give it in each of the versions beginning with St. Gall:

A certain man gave his son to a monastery and, as demanded by the abbot, rendered a payment of ten pounds. The son was ignorant of this because of his age. The boy matured. He quickly became a priest. The suffragan bishops selected him to become a fellow bishop on his merits. Finally, his father interceded with his consent and prayers to his election and also gave money to a

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Harris Eichbauer, *St. Gall Stiftsbibliothek 673 and the Early Redactions of Gratian's Decretum*, 27 BULL. MEDIEVAL CANON L. 105 (2007).

32. See Pennington, *Big Bang*, *supra* note 5, at 63–66; see also José Miguel Viejo-Ximénez, *Las Novellae de la Tradición Canónica Occidental y del Decreto de Graciano*, in *NOVELLAE CONSTITUTIONES: L'ULTIMA LEGISLAZIONE DI GIUSTINIANO TRA ORIENTE E OCCIDENTE, DA TRIBONIANO A SAVIGNY: ATTI DEL CONVEGNO INTERNAZIONALE, TERAMO, 30–31 OTTOBRE 2009* 207 (Luca Loschiavo, Giovanna Mancini & Cristina Vano eds., 2011).

33. See Rolandus [de Bologna] (Papst Alexander III. [Magister Rolandus, Rorlando Bandinelli *male*]), *DIE SUMMA MAGISTRI ROLANDI, NACHMALS PAPSTES ALEXANDER III., NEBST EINEM ANHANGE; INCERTI AUCTORIS QAESTIONES* (1874), reprinted in *SUMMA MAGISTRI ROLANDI, MIT ANHANG INCERTI AUCTORIS QAESTIONES* (Friedrich Thaner ed., 1962) (1874 edition is flawed); see also Kenneth Pennington & Wolfgang P. Müller, *The Decretists: The Italian School*, in *THE HISTORY OF MEDIEVAL CANON LAW IN THE CLASSICAL PERIOD, 1140–1234: FROM GRATIAN TO THE DECRETALS OF POPE GREGORY IX 131–35* (Wilfried Hartmann & Kenneth Pennington eds., 2008).

34. See Marina Bernasconi Reusser, *Considerazioni Sulla Datazione e Attribuzione del Decretum Gratiani Cod. Sang. 673: Un Manoscritto di Origine Italiana in Terra Nordalpina*, in *SCHAUKASTEN STIFTSBIBLIOTHEK ST. GALLER: ABSCHIEDSGABE FÜR STIFTSBIBLIOTHEKAR ERNST TREMP 142–47* (Franziska Schnoor, Karl Schmuki & Silvia Frigg eds., 2013).

35. See Eichbauer, *supra* note 3, at 1113–14 (summarizing various arguments on both sides of issue very well with detailed bibliographical references).

member of the archbishop's household; he was consecrated bishop without knowing of his father's consent and of his gifts of money. As time passed he ordained some clerics for free and others for money. Consequently, he was accused and convicted [of simony]. He suffered the judgment that condemned him.<sup>36</sup>

The other pre-Vulgate and Vulgate versions presented a more nuanced and detailed story:

A certain man had a son whom he gave to a very wealthy monastery. The abbot and the brothers demanded ten pounds to take his son. His son, because of his age, did not know about the money. The boy grew and with the passing of time and with a succession of offices, he came of age and was ordained a priest. Finally, he was elected bishop by the suffragan bishops because of his talents. His father gave his consent and prayers to his election and also gave money to a member of the archbishop's household; he was consecrated bishop without knowing of his father's consent and of his gifts of money. In the passing of time, he ordained several priests for money and to others he gave the sacerdotal benediction for free. Finally, he was accused and convicted [of simony] at the archiepiscopal court. He accepted his judgment of damnation.<sup>37</sup>

A comparison of the two texts makes it difficult to imagine that the pre-Vulgate text in St. Gall is an abbreviation of the pre-Vulgate text in the other manuscripts. The pre-Vulgate hypothetical incorporated specific

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36. *DECRETUM*, St. Gall, Stiftsbibliothek 673, 28–29 [hereinafter *DECRETUM*, St. Gall] (“Obtulit quidam filium suum cenobio qui exactione abbatis motus x. libras monasterio soluit. Ipso tamen filio propter etatem hoc ignorante. Creuit puer. De hinc ad sacerdotium conuolauit. Suffragantibus meritis in episcopum est assumptus. Tandem obsequio ac precibus paternis intercedentibus pecuniam quoque ex consiliariis archiepiscopi cuidam data consecratur electus, oblate pecunie paterni obsequi penitus ignarus. Ac per hoc tempore procedente quosdam gratis, non nullos etiam per pecuniam ordinauit; qui tandem accusatus et conuictus, contrariam sibi sententiam reportauit.”).

37. See *DECRETUM*, *supra* note 7 (Paris, Bibliothèque Nationale de France nov. acq. lat. 1761, fol. 83vb–84ra and Paris, Munich, Staatsbibliothek Clm 13004, fol. 97ra: “Quidam habens filium obtulit eum ditissimo cenobio exactus (ab *add.* Me) abbate et fratribus x. libras soluit ut filius susciperetur (reciperetur Me), ipso tamen beneficio etatis hoc ignorante. Creuit puer et per incrementa temporum et officiorum ad virilem etatem et sacerdotii gradum peruenit. Exinde suffragantibus meritis in episcopum eligitur, interveniente obsequio et paternis precibus data quoque pecunia cuidam ex consiliariis archiepiscopi consecratur iste in antistitem nescius paterni obsequi et oblate pecunie. Procedente vero tempore nonnullos per pecuniam ordinauit, quibusdam uero gratis benedictionem sacerdotalem dedit, tandem apud metropolitanum suum accusatus et conuictus sententiam in se damnationis accepit.”) An edition of this version of Gratian's *Decretum* is being prepared under the leadership of Anders Winroth. For its progress, see *Decretum Gratiani: First Recension*, <https://sites.google.com/a/yale.edu/decretumgratiani/home> (last visited Aug. 17, 2014).

facts into the case that are left out or remain ambiguous in St. Gall. The pre-Vulgate's monastery was wealthy. It practiced simony in spite of its wealth. After his ordination, the boy received other clerical offices on his merits, one presumes, and not simoniacally. In contrast, the St. Gall case suggests that the boy became a priest inappropriately quickly (*convolare* = to fly). The description of the court's decision in St. Gall (*contraria sententia*) could be interpreted to imply that the bishop lived with a decision that was not in accord with his own views of his actions. In the other pre-Vulgate hypothetical, the bishop accepts his fate. These differences do not suggest an abbreviator to me. They suggest a reworking by Gratian.

Gratian then listed seven questions that he wished to consider, which are almost the same in all the versions of the text. Number six was the question whose text created a problem of interpretation: "Sixth [question] Whether those who were ordained by him in the past without knowledge of his simony must be deposed?"<sup>38</sup> There was only one text in the entire corpus of canon law that could answer that question: two canons that Pope Urban II had promulgated at the Council of Piacenza in 1095. To answer Question Six, Gratian presented the two Piacenza canons as one canon in the St. Gall manuscript.<sup>39</sup> The logical place for the canon was in Question Six. That is exactly where it is in the St. Gall manuscript:

If those, he said, who were ordained by simoniacs but not simoniacally can be proven that when they were ordained to have not known the [bishops] were simoniacs, then they will be considered as Catholics in the Church, and we will sustain those ordinations mercifully, if their laudable lives endorse them. Who, however, knowingly is consecrated by simoniacs, rather one would say execrated, we declare that their consecration is completely invalid.<sup>40</sup>

38. DECRETUM, St. Gall, *supra* note 36, at p.29 ("Sexta: An illi qui ab eo iam symoniaco igoranter sunt ordinati abici debeant."). The later versions add "aut non" to the end of the question.

39. See ROBERT SOMERVILLE, POPE URBAN II'S COUNCIL OF PIACENZA: MARCH 1-7, 1095 91-92, 104-11 (2011) (printing edition of canons and discussing canons with information about canonical collections that included these texts).

40. DECRETUM, St. Gall, *supra* note 36, at p.41b. The text is slightly different from the pre-Vulgate and Vulgate, which are closer to the conciliar canons (C.1 q.1 c.108): "Si qui, inquit, a symoniacis non symoniace ordinantur, siquidem probari potuerint se, cum ordinaretur, nescisse eos symoniacos esse, et tunc pro catholicis habebantur in ecclesia, talium ordinationes misericorditer sustinemus, si tamen eos laudabilis uita commendat. [Qui uero scienter se a symoniacis consecrari immo execrari permiserint, eorum consecrationem omnino irritam esse decernimus.]" Urban II, Council of Piacenza, c.3 and [c.4]: *Collectio X partium*, fol. 76r, where the chapters are separated. *Collectio 3 librorum* 2.8.11 in medio. 9L 3.5.1. The additional "inquit" is found in other Urban texts. It is one other small bit of textual evidence that Sg cannot be an abbreviation. For a discussion of references to the pope in the third person, see ROBERT SOMERVILLE, POPE URBAN II, THE COLLECTIO BRITANNICA, AND THE COUNCIL OF MELFI (1089) CB 8, 11, 17, 28, 44 (1996). Most importantly, Gratian included another canon attributed to Urban, *Duae sunt*, that also uses "inquit" in its incipit, which I have discussed. See Kenneth

In the transition from the St. Gall *Decretum* to the manuscripts in Florence, Paris, Barcelona, and Admont, Gratian added fifteen canons to Question One between c.90 and c.113. One of those canons was a decretal of Pope Nicholas II, in which the pope distinguished between several types of simoniacal ordinations: simoniacs ordained simoniacally by simoniacs, simoniacs ordained by non-simoniacs, and simoniacs ordained by simoniacs but not simoniacally. Nicholas did not, however, cover all the possible permutations, the most important being the legal issue of ignorance. Gratian had already applied the principle of ignorance to marriage law in St. Gall *Causa* 26 (=29).

As he considered Nicholas's decretal, Gratian must have thought, "what about the cleric, as in my hypothetical, who was ignorant that the prelate was simoniacal? Or a cleric, as in my hypothetical, who did not know that someone was paying for his ordination?" He must have also considered the issue that his raising the question of ignorance in Question One, and not leaving it for Question Six, disturbed the organization that he had created for *Causa* One. In Question One, his question had been: "Is it a sin to buy spiritual things?"<sup>41</sup> In spite of whatever reservations he may have had, Gratian moved Urban's conciliar canon from Question Six to Question One and placed it after Nicholas's decretal. As Gratian remarked in the dictum he wrote before the canon:

But these clerics [i.e. Nicholas's last category] must be understood as being those who are ordained by simoniacal prelates, whom they did not know were simoniacal. The decretal makes these simoniacs, but not guilty of a crime, yet [having] an ordination of a simoniac. Concerning these clerics Pope Urban stated [in his canon].<sup>42</sup>

Moving a canon is unique in the textual tradition of the *Decretum*. *Causa* One Question One is the only place in the *Decretum* in any of its versions where Gratian moved a text significantly. We may think with some justification that he could have placed Nicholas's decretal in Question Six. Question One was already ungainly long. His moving Urban's canons did not improve his argument or the organization of *Causa* One. Nevertheless, he moved Urban's text. Gratian then reworked his introductory dictum to Question Six in his later versions of the *Decretum* to read: "What indeed ought to be done concerning those who unknowing are ordained by simoniacs, which is asked in the sixth question, is found above in the

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Pennington, *Gratian, Causa 19, and the Birth of Canonical Jurisprudence*, in 4 "PANTA REI": STUDI DEDICATI A MANLIO BELLOMO 344 (Orazio Condorelli ed., 2004).

41. See *DECRETUM*, *supra* note 7, at C.1 d.a.c.1 ("Hic primum queritur an sit peccatum emere spiritualia?").

42. See *id.* C.1 q.1 d.a.c.108 ("Sed hoc intelligendum est de his qui ordinantur a simoniacis, quos ignorabant esse symoniacos. Hos facit simoniacos non reatus criminis, sed ordinatio symoniaci. De quibus Urbanus papa ait.").

chapter of Urban that begins: ‘Si qui a simoniacis non simoniace ordinati sunt.’”<sup>43</sup>

Previously in the St. Gall manuscript, Gratian had introduced the Piacenza canons with a dictum, and it is this dictum that has created problems of interpretation and the conviction of some that St. Gall is an abbreviation:

Quid autem de his fieri debeat qui ignoranter a symoniacis ordinati sunt, quod quidem sexto loco quesitum est supra in capitulo Urbani dictum est quod, quia forte ibi quantum ad negotium pertinebat integre poni non fuit necessarium, in presenti ad evidentiam in medium adducamus.<sup>44</sup>

In translation:

What moreover ought to be done with those clerics who unknowingly are ordained by simoniacs, which is asked in the sixth question, [can be found] in the chapter of Urban that has been cited above, but indeed, because it was not necessary to place the entire text there as far as it pertained to the issue, I bring it forward here.

Winroth and others have interpreted Gratian’s dictum at the beginning of Question Six as being proof of St. Gall’s being an abbreviation.<sup>45</sup> They assume that the abbreviator fell asleep and forgot that he had omitted Pope Nicholas’s canon and also that he had eliminated Urban’s canons immediately after Nicholas’s. With that assumption, Winroth is quite right that the reference is puzzling and, if he had interpreted the passage correctly, could be a solid proof that St. Gall is an abbreviation. However, the compiler of the St. Gall text was quite wide awake. What Winroth overlooked was that Gratian had, in fact, cited Urban’s canon “supra” in Question Four of St. Gall and in all the subsequent versions of the *Decretum*. That is the place Gratian referred to in his dictum before Question Six in St. Gall. He was not citing a now non-existent text in the first question. He alerted his readers that he could have put Urban’s canon in Question Four but did not. In his dictum in Question Four, he had written: “Again, if someone is excused from having been ordained unknowingly by a simoniac, just as he can be excused who is ordained simoniacally but unknow-

43. See *id.* C.1 q.6 d.a.c.1 (Paris BNF nov. acq. lat. 1761, fol. 102va; Florence, B.N. Con. Sopp. A.1.402, fol. 25rb) (“Quid<sup>a</sup> uero<sup>b</sup> de his fieri debeat qui ignoranter a simoniacis ordinati sunt<sup>c</sup>, quod sexto loco quesitum est supra<sup>d</sup> in capitulo uidelicet Urbani quod sic incipit, Si qui<sup>e</sup> a simoniacis non simoniace ordinati sunt requiratur. <sup>a</sup> Quod<sup>ac</sup> Fd <sup>b</sup> igitur<sup>ac</sup>, autem<sup>bc</sup> Fd <sup>c</sup> nunc autem *add.* Fd<sup>ac d</sup> quod—supra *om.* Fd<sup>ac e</sup> quis<sup>pc</sup> Fd”).

44. DECRETUM, St. Gall, *supra* note 36, at p.41 C.1 q.6 d.a.c.1.

45. See Anders Winroth, *Recent Work on the Making of Gratian’s Decretum*, 26 BULL. MEDIEVAL CANON L. 1, 20–21 (2006).

ingly.”<sup>46</sup> In the later versions of the *Decretum*, Gratian clarified that the dictum referred to Urban’s canon that was now placed in Question One with an inserted added phrase: “Again, if someone is excused from having been ordained unknowingly by a simoniac, as seen above in Urban’s canon [in q.1 c.108], he can also be excused who is ordained simoniacally but unknowingly.”<sup>47</sup> Once Gratian’s dictum before Question Six in the St. Gall manuscript is understood to refer to his dictum in Question Four, the use of this passage as being a proof that St. Gall is an abbreviation cannot be sustained. An abbreviator did not nod; Gratian was practicing a methodology he used in all the versions of his *Decretum*: referring to canons in other parts of his work with their first few words or, as here, with a short reference to a canon’s content.

The other arguments for and against St. Gall’s being an abbreviation rest upon small textual variants that cannot come close to being a full proof. A number of scholars, including me, have made textual arguments taken from Gratian’s dicta in St. Gall. Some are more persuasive than others. None of them makes a full proof for either opinion.<sup>48</sup> As I have stated above, I believe that the textual anomalies in St. Gall in *Causae* 27–36 of Gratian’s text cannot be used as evidence of an abbreviation because I believe the text is a redaction with interpolations.<sup>49</sup> A significant piece of evidence for my conviction about St. Gall’s being an early pre-Vulgate version of Gratian’s *Decretum* and not an abbreviation are the four *authenticae* that are added to the margins of the manuscript. Two of them Gratian included into the text of the *Decretum* in later recensions. Two of them he did not. Gratian did not add them to the margins of St. Gall; someone else did. Whoever added these *authenticae* to St. Gall knew Roman law very well and was using the manuscript to teach canon law in a center where others must have been teaching Roman law. Such a person, I have argued, would not have been teaching with an abbreviation.<sup>50</sup>

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46. *DECRETUM*, St. Gall, *supra* note 36, at p.38 C.1 q.4 d.p.c.10 (“Item si excusatur qui a symoniaco ordinatur ignoranter et utique iste excusari potest qui per ignorantiam symoniace ordinatur.”).

47. *DECRETUM*, *supra* note 7, C.1 q.4 d.p.c.10 (P fol. 100va, Fd fol. 24v) (“Item si excusatur qui ignoranter a simoniaco ordinatur, ut supra in capitulo Urbani legitur, et iste excusandus est qui per ignorantiam symoniace ordinatur.”).

48. *Causa* 29 (Sg 26) has a particularly interesting set of textual variants that suggest that St. Gall is not an abbreviation. See José Miguel Viejo-Ximénez, *Non omnis error consensum euacuat: La C. 26 de los Exserpta de Sankt Gallen (Sg)*, in *IUSTITIA ET IUDICIUM: STUDI DI DIRITTO MATRIMONIALE E PROCESSUALE CANONICO IN ONORE DI ANTONI STANKIEWICZ* 617, 630–31 (Janusz Kowal & Joaquín Llobell eds., 2010) (especially his conclusion at 630–31).

49. One of the texts is a canon of Pope Innocent II, commonly attributed to Lateran II. It is the only Innocent II text in the *Decretum* that is attributed to a council held in Rome. If it is not a Lateran II canon, then it would be possible that St. Gall is Gratian’s work.

50. See Pennington, *Big Bang*, *supra* note 5, at 64; Pennington, *Roman Law Jurisprudence*, *supra* note 5, at 35–53.



There are other arguments for St. Gall's being an abbreviation. Anders Winroth noticed, as many other scholars have, that Gratian cited the Bible frequently in his dicta. He chose canons with many biblical citations as well. Winroth drew attention to the fact that Gratian cited the Pseudo-Paul Pastoral Epistles to Timothy and Titus when he analyzed clerical discipline in Distinctions 25–49. That Gratian would have turned to these epistles was inevitable. Any medieval author who discussed clerical behavior and norms of rectitude would have thought immediately of the Pastoral Epistles. The canons Gratian compiled for those distinctions cited them many times more than Gratian did. Winroth concludes his discussion about Gratian's use of the Pastoral Epistles with the statement:

Gratian's use of St. Paul for his organization is, incidentally, a well-nigh irrefutable argument against the idea that the text of the Decretum known from the infamous manuscript St. Gall, Stiftsbibliothek 673 would be the earliest version of Gratian's work. This manuscript makes a hash of that organization, cutting most references to the Epistle to Timothy, while allowing a few to stand, orphaned and barely intelligible.<sup>51</sup>

Like black truffles, irrefutable arguments are hard to find in scholarly debates. There are two very good reasons for thinking that Winroth's conclusions can be questioned. The first objection is that the Pseudo-Pauline Epistles do not provide an "organization" or an "organizing principle" for Gratian's distinctions in the ordinary sense of those terms. He does not follow the Epistles exactly as they discussed clerical discipline line by line or chapter by chapter. He skips around in the Epistles, quoting them and taking whichever ideas he found useful for the issues he was discussing. He also cited other texts in the Pauline Epistles in his analysis of clerical rectitude. If there is no organization or organizing principle in his use of the Pastoral Epistles, it cannot be violated.

The second objection, and much more weighty, is that comparing the Distinctions to *Causa prima* in St. Gall is to compare two different literary genres. In *Causa prima*, Gratian created a hypothetical, asked a series of questions, and presented texts that pertained to his case. He presented a hypothetical in which a student had a concubine, a subdeacon had a wife, and after this sorry amorous history became a priest and then a bishop. In St. Gall, Gratian did not focus on "what are the virtues a cleric should have?" In the Distinctions, he did. When he refashioned that material, the wingspan of his subject matter was much wider. In *Causa prima* of St. Gall, Gratian explored clerical sexual norms and how they might affect a prelate's status; in the later distinctions that grew out of *Causa prima*, he dealt with a much broader set of issues touching on clerical discipline and

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51. Anders Winroth, *Where Gratian Slept: The Life and Death of the Father of Canon Law*, 99 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, KANONISTISCHE ABTEILUNG 105, 110 (2013) (footnote omitted).

what characteristics a good cleric should possess. The difference is not trivial. It is an entirely different project. To compare the two is to compare *tuber melanosporum* (black truffles) to *agaricus bisporus* (button mushrooms). To combine the two is not good gastronomy or scholarly methodology. Timothy and Titus have not much to say about clerical sexual behavior covered in *Causa prima* of St. Gall; they have a lot to say about the topics covered in the Distinctions.

Finally, Winroth's conclusion sidesteps another question about St. Gall that I raised ten years ago: if St. Gall is an abbreviation, why did the abbreviator ignore the *Tractatus de legibus* D.1–20 and Distinctions 80–101? Or why did the abbreviator cut out *Causae* 24–26 and 28? If the abbreviator went to the trouble of transforming the Distinctions 27–79 into *Causa prima*, and if he was using the text to teach, chopping out the *Tractatus de legibus* is strange. A good reason for deleting certain *causae* is also difficult to find. It is an old principle of humanistic scholarship that the easiest and simplest explanation for textual changes is usually the most compelling. To my mind, when Gratian decided that the issue of clerical marriage and sexual behavior had been resolved by conciliar legislation of Lateran I and Innocent II's councils, especially Pisa in 1135, he set to work dismantling *Causa prima*.<sup>52</sup> He quite logically put together his distinctions on clerical discipline before his first *Causa*.<sup>53</sup> To imagine an abbreviator taking the Distinctions between 27 and 79, omitting half the canons, and creating a coherent *causa* is to my mind not only a much *difficilior* task, but also raises the question: why did he do it? If one argues that the abbreviator created *Causa prima*, one ought to give reasons why he thought there was a need for that *Causa*. Was there any longer a need for a *causa* with the issues of *Causa prima*? Gratian certainly did not think so when he finished the Vulgate *Decretum*. No *causa* of the Vulgate focuses on the problems Gratian broached in *Causa prima*.

In the end, what can we conclude from the manuscript evidence that remains from the early versions of Gratian's *Decretum*? He taught many years in Bologna and had many students. Some of them began to gloss and comment on his *magnum opus*.<sup>54</sup> The glossators began their work very early. The primitive set of glosses contained in all the early manuscripts of the *Decretum*, pre-Vulgate and Vulgate, with its citations to Burchard of Worms' *Decretum* and to the *Lombarda*, is undoubtedly of Italian origin.<sup>55</sup>

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52. Lateran II c.7 has been cited as the definitive statement on clerical marriage, but it repeats the prohibition that Innocent II promulgated at Pisa in 1135, c.4 or c.1. See Robert Somerville, *The Council of Pisa, 1135: A Re-Examination of the Evidence for the Canons*, 45 *SPECULUM* 98, 103–06 (1970) (showing canon as it appears in different manuscripts).

53. See Pennington, *supra* note 40, at 351–53.

54. Winroth's latest conjecture is that Gratian may have taught for only one or two years. See Winroth, *supra* note 51, at 125–26.

55. This is not to say that this earliest set of glosses was a coherent and uniform text. The manuscripts prove that without a doubt.

Nonetheless, they circulated in the margins of Gratian's text following it wherever it went.

John T. Noonan wrote his conclusion without the benefit of what we know today about Master Gratian. It is still a pretty good biographical summary: Gratian "revealed himself to be a teacher with theological knowledge and interests and a lawyer's point of view. He worked in Bologna in the 1130s and 1140s."<sup>56</sup> I would tweak his conclusion only with "also the 1120s." In my reading of the *causae* and thinking about the changes he made in the different versions of his book, I have been impressed by how Gratian developed and expanded his analysis of the problems posed by the hypotheticals he created. One could conclude, as I have, that he could not have done that work and thought through so many different legal issues in a few years of teaching.

"Horror vacui" is a metaphor that applies to almost any field of study. If we do not know what we wish we could know, we search for evidence to fill in the void of our ignorance. Noonan proved quite persuasively that the "horror vacui" created a rich tapestry of illusory knowledge about Gratian during the twelfth and thirteenth centuries. Twenty-first century scholars have taken up the search to know more about Gratian. It is a worthy quest. Anders Winroth has endorsed two medieval conjectures that have been recently put forward by other scholars: that Gratian was a bishop of Chiusi and that he participated in a Venetian court case in 1143. Both of these conjectures would mean that Gratian lived until circa 1145. Winroth has done more to revive and invigorate the study of Gratian's *Decretum* than anyone else in the last 200 years. Not surprisingly, he cares about Gratian and thinks often about this man who did so much to launch European jurisprudence. Although I may not agree with all of his conclusions or conjectures about Gratian, I must emphasize that Winroth's work has opened new vistas and perspectives for thinking about Gratian the teacher, the jurist, and the man. A few disagreements do not undermine or diminish his achievement.

Winroth has been convinced by an argument, first advanced by Francesco Reali, that Gratian became the bishop of Chiusi at the end of his life. Medieval authors also thought Gratian had been the bishop of Chiusi.<sup>57</sup> Reali noticed that a necrology of the Cathedral Chapter of Siena contained a notice that a Gratian from Chiusi, who was also a bishop, had died sometime in the middle of the twelfth century.<sup>58</sup> Reali made the assumption that this Gratian was not only from Chiusi but also had been bishop of Chiusi. Winroth has embraced Reali's discovery and used it as evidence of Gratian's fate in the 1140s. There is, in fact, as Noonan had already noted, very early evidence for Gratian's having been a bishop. Rudolf Weigand

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56. Noonan, *Gratian Slept Here*, *supra* note 1, at 172.

57. See Larson, *supra* note 9, at 54–55.

58. See Francesco Reali, *Magister Gratianus e le origini del diritto civile Europeo*, in *GRAZIANO DA CHIUSI E LA SUA OPERA: ALLE ORIGINI DEL DIRITTO COMUNE EUROPEO* 98–101 (F. Reali ed., 2009).

printed an introductory gloss or prologue that precedes eight *Decretum* manuscripts.<sup>59</sup> In three of them, the text states that Gratian divided the *Decretum* into two parts, i.e., that the last part on sacraments, *De consecratione*, was not yet part of the *Decretum*; the other five manuscripts change the two parts to three.<sup>60</sup> All five manuscripts that contain “three parts” are later copies of the *Decretum*. The reading of the three manuscript witnesses for this passage is certain evidence that the gloss was written very shortly after the Vulgate version of the *Decretum* left Gratian’s desk in Bologna without the third part, *De consecratione*.<sup>61</sup>

The scribe of possibly the oldest of these three manuscripts, Paris, Bibliothèque nationale de France lat. 3884-I, entered the text on the folio preceding the beginning of the *Decretum*.<sup>62</sup> We cannot know with certainty whether this short prologue was an attempt to introduce the *Decretum* to readers or an introduction to the primitive set of glosses in the margins of the manuscript or both:

In the name of our Lord Jesus Christ.

The first part of the *Decretum* begins with a discussion of written and non-written law. It treats the authority of law, the election of clerics and their dispensation.

*The Concord of discordant canons. In the beginning a treatment of the ius of constitutions and of nature.*<sup>63</sup>

The Concord of Discordant Canons which Bishop Gratian organized into two parts. The first part contains 101 Distinctions, although Distinction 49 (48) seems incomplete.

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59. See Rudolf Weigand, *Frühe Kanonisten und ihre Karriere in der Kirche*, 76 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, KANONISTISCHE ABTEILUNG 135, 152–53 (1990).

60. See Winroth, *supra* note 51, at 115–16 (“Perhaps this means that this glossator wrote before the second recension with its three parts circulated, in which case it would be very early testimony, say from the 1140s, more or less contemporary with Gratian.”). He did not, however, take the passage as solid evidence because he mistakenly thought only one manuscript had the “duas” reading. Further, because he believes that Pf is the only witness, he states that “[o]ne Parisian law teacher told his students that Gratian was a bishop.” *Id.* at 115. From our discussion, it should be clear that the text is not the product of one French canonist.

61. See Eichbauer, *supra* note 3, at 1112–13.

62. The other two manuscripts containing the earliest version of this gloss, according to Weigand, are Gent, Bibliotheek der Rijksuniversiteit 55, and Trier, Stadtbibliothek 906 (1141). See Rudolf Weigand, *The Development of the Glossa ordinaria to Gratian’s Decretum*, in THE HISTORY OF MEDIEVAL CANON LAW IN THE CLASSICAL PERIOD, 1140–1234: FROM GRATIAN TO THE DECRETALS OF POPE GREGORY IX 59 (Wilfried Hartmann & Kenneth Pennington eds., 2008).

63. The Italicized text is in a rubricated style of capital letters and is a common rubric at the beginning of the early *Decretum* with small variations, e.g., Biberach, Spitalarchiv B.3515, fol. 10r; Köln, Dombibliothek 127, fol. 9r; Mainz, Stadtbibliothek II.204, fol. 2r; Salzburg, Stiftsbibliothek a.xi.9, fol. 11r.

The second part contains 36 *causae* and you must note that several canons are edited<sup>64</sup> and are arranged in various *causae* so that if indeed you wish to see the entire canon, [you can find it] in another place; you may not presume to fill them in or to continue as if this was the result of scribal error. Similarly even when you find other translations of Greek councils, you should consider those reliable which are inserted into this work. You should not presume to mix similar chapters or change a series of translations.<sup>65</sup>

The text is not without its intriguing ambiguities. The first line is a standard introduction to a medieval work, but not, as far as I know, to Gratian. Weigand did not include this line of text in his edition. If it does occur in the other manuscripts, that would be a stronger piece of evidence that it is part of a prologue introducing the glosses, not to Gratian's text. The second sentence is a summary of the subject matter of Distinctions 1–101. That too might be part of the prologue to the glosses. The italicized text is taken from a different tradition that one finds at the beginning of quite a few twelfth century Gratian manuscripts. The scribe must have had two different texts in front of him and combined them. The remainder, that I have taken from the Paris manuscript and which Weigand calls the early version, called the readers' attention to three textual matters. The first is that Distinction 49 (or 48) is not complete. The second is a warning that the reader should not be concerned if other texts, presumably in other collections, were different. Gratian had edited them to suit his purpose. Finally, the Greek councils that Gratian inserted into the *Decretum* should be respected. Gratian, he implied, made good choices.

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64. Shortening and editing canons and decretals, the omitted parts they called "intercisiones" became standard editorial practices of the canonists from Gratian to Raymond de Peñafort. See Kenneth Pennington, *The French Recension of Compilatio tertia*, 5 BULL. MEDIEVAL CANON L. 53, 60–63 (1975) (giving examples).

65. fol. 15v: Written in red ink, rubric style:

In nomine domini nostri Ihesu Christi. Prima pars incipit de iure scripto et non scripto et quod cui preponatur et legum auctoritatibus et clericorum electione siue dispensatione.

Concordia discordantium canonum. Ac primum de iure constitutionis et nature.

Concordantia discordantium canonum iuxta determinationem Gratiani episcopi que in duas partes divisa. Prima pars constat centum et una distinctione, licet xl.<sup>ma</sup>ix.<sup>na</sup> (Trier has 48) incompetens uideatur. Secunda uero causis xxx.vi. ubi notandum est nonnulla esse intercisita capitula atque ita digesta prout diuersis causis uisum est expidiri (sic) que quidem cum alibi repperiris integra supplere his seu continuare tanquam id scriptoris uicio contigisset. Similiter etiam cum alias grecorum conciliorum translationes inueneris, eas sufficere tibi credens de qua huic operi sunt sumpta congruentia capitula miscere uel uariare translationum seriem non presumas.

Another early manuscript, Heiligenkreuz, Stiftsbibliothek 44, fol. 8v, began with the text "In nomine—siue dispensatione [in a slightly garbled form]" but omits the rest.

I lean towards thinking the text is a prologue to the primitive and sparse but significant glosses in Paris, BNF 3884-I and II. Weigand had studied manuscripts with these glosses for years and called them part of the “First Composition” of glosses when he worked out his categorization of early glosses to Gratian.<sup>66</sup> He did not mention in his work that this layer of glosses, which is found in almost all the early glossed Gratian manuscripts, including the pre-Vulgate Barcelona and Admont manuscripts, included many references to canons in Burchard of Worms’s *Decretum* and to texts in the *Lombarda*.<sup>67</sup> No other pre-Gratian canonical collection received as much attention from the early canonists in the margins of *Decretum* manuscripts as Burchard of Worms’s *Decretum*. Their function has not yet been studied. Were they to supplement, support, or contradict Gratian’s choices of sources? Some were later incorporated into the Vulgate *Decretum* as “paleae.” The citations to Burchard disappear from the margins after circa 1200. The citations to Lombard law are not as frequent.<sup>68</sup> Citations to the *Lombarda* are not common in Italian Roman law manuscripts and have not been noticed before in canonistic texts.<sup>69</sup> Weigand had already concluded that the “First Composition” was very early, not later than 1150, perhaps earlier. Its presence is a good test for the date of a manuscript. No canonist would have needed or wanted these glosses after circa 1150. This layer of glosses also can provide evidence of its origins: Italy. Although Paris, BNF 3884-I and II are written and illuminated in Northern France, it is difficult to think of many reasons why a Northern French jurist would be interested in Lombard law. These allegations to the *Lombarda* would have been of interest and use to canonists in Northern and Southern Italy and make it likely that the First Composition

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66. See RUDOLF WEIGAND, *DIE GLOSSEN ZUM ‘DEKRET’ Gratians: Studien zu den frühen Glossen und Glossenkompositionem* 26–27 (1991); Weigand, *supra* note 62, at 55–97 (providing compact version of his magnum opus in English).

67. All the early manuscripts of the Vulgate with glosses, listed in *supra* note 7, contain Burchard and *Lombarda* citations. The form of citation is, e.g., Pf, fol. 45v: B. xix. Si quis [clericus] uexatus (Burchard 19.93) in the margin opposite D.33 c.3. In this case, the canon in Burchard dictated ten years penance for clerics who were possessed by demons. If they were freed from demons, they could resume their clerical duties. Gratian’s text stipulated one year of freedom from demons. Sometimes the scribes confused the B with D. D.33 c.3 occurs only in the Vulgate *Decretum*.

68. Cited as Lombar. or Lom. de decimis, l.iii. (*Lombarda* 3.3.3) in Pf fol. 195r in the margin opposite C.12 q.2 c.26, which is only in the Vulgate *Decretum*. The text in the *Decretum* instructs bishops how they should divide tithes; the c.3 in the *Lombarda* is a general admonition to do so, which is followed by c.4 with more detailed instructions. The *Lombarda* citations are primarily found in the *causae*.

69. See *Glosse preaccursiane alle Istituzioni: Strato Azzoniano Libro primo and Libro secondo* (Severino Caprioli, Victor Crescenzi, Giovanni Diurni, Paolo Mari & Piergiorgio Peruzzi eds., *Fonti per la Storia d’Italia* 107 and *Antiquitates* 14; Roma: Nella Sede dell’Istituto, 1984–2004) (where not a single gloss to the *Lombarda* is recorded); see also Pennington, *Roman Law Jurisprudence*, *supra* note 5, at 35–53; Kenneth Pennington, *The Constitutions of King Roger II of Sicily in Vat. lat. 8782*, in 21 *RIVISTA INTERNAZIONALE DI DIRITTO COMUNE* 35 (2010).

had its origins in the Italian schools.<sup>70</sup> The presence of the First Composition gloss that graces the margins of the Barcelona and Admont manuscripts is good evidence that the pre-Vulgate *Decretum* circulated long enough for someone to have composed a gloss for it. If the pre-Vulgate manuscripts had had a very short shelf life, no one would have bothered.

There is one more puzzle in Paris, BNF lat. 3884-I. Carlos Larrainzar discovered that the front flyleaf was a folio from a pre-Vulgate version of Gratian's *Decretum*.<sup>71</sup> Jacqueline Rambaud had long been convinced of the manuscript's significance, and Larrainzar's discovery raises intriguing if unanswerable questions. The manuscript was produced in an important center. No expense was spared on its production. The text was divided into two volumes and provided with magnificent illuminations. One might presume that when the Vulgate text arrived, the owners of the pre-Vulgate text decided to trash their old text and use the manuscript(s) for more mundane purposes, like flyleaves. If one could localize this manuscript and trace other manuscripts produced at the center, one might find more flyleaves of pre-Vulgate Gratians. One might guess that Paris, BNF 3884-I was produced in a major center in Northern Europe for the study of canon law and that the center had close ties to Bologna. Art historians have connected its illuminations to Paris or perhaps Sens. An important center in Paris would make sense.

What does this information mean for Gratian's biography? First, the glosses in Barcelona, Admont, Paris, BNF 3884-I and II, and other manuscripts were not written in Northern Europe but in Italy. This very early Italian glossator(s) of Gratian's text who was writing close to 1140 thought that Gratian was a bishop. For obvious reasons, he would have been in a position to know. The *Decretum* in its earlier forms was an immediate success all over Christian Europe. The oldest three manuscripts of the eight that contained the "prologue" discussed above identify Gratian as the compiler. Other manuscripts do as well.<sup>72</sup> It is not accurate to say that Gratian

70. Weigand did not venture an opinion on the origins of these glosses. See Weigand, *supra* note 62.

71. See WINROTH, *supra* note 3, at 32.

72. See, e.g., DECRETUM, *supra* note 7, Clm 13004, fol. 30r ("Hoc opus inscribitur de Concordia discordantium canonum quod a quodam Gratiano compositum in libros xxxvii. est distinctum.") This particular manuscript has long been recognized as an early witness. The author of this introduction did not know "De consecratione": "Primus liber continet divisiones, diffinitiones, necnon et differentias legum tam secularium quam ecclesiarum et quomodo uel a quibus uel quando sint institute de electione quoque seu ordinatione clericorum. Secundus continet de scienter seu ignoranter a symoniacis ordinatis et de ordinationibus que per pecuniam fiunt." Admont, Stiftsbibliothek, fol. 8r has the same text. Carlos Larrainzar has discussed and edited the complete text. See Carlos Larrainzar, *Notas sobre las introducciones In prima parte agitur y Hoc opus inscribitur*, in *MEDIEVAL CHURCH LAW AND THE ORIGINS OF THE WESTERN LEGAL TRADITION: A TRIBUTE TO KENNETH PENNINGTON* 134–53 (Wolfgang P. Müller & Mary E. Sommar eds., 2006). These two manuscripts cannot be dated later than 1145–1150. If Gratian were unknown, it is puzzling how he might have been discovered to be the compiler of the *Decretum*.

was unknown or that the glossators did not mention his name. As Noonan illustrated in great detail, twelfth century authors thought they knew many details about him.<sup>73</sup> But was he bishop of Chiusi, as Reali and now Winroth would like to believe?<sup>74</sup>

The passage about Gratian in the Siena necrology was written after an entry, but on the same line as a notice of a certain Anselm. Anselm's death is not dated. It reads: "Obit Anselmus subdiaconus et canonicus Sancti Martini Lucensis." At the end of Anselm's entry a later scribe added: "et Gratianus Clusinus episcopus." Reali and Winroth date both hands to the twelfth century, and I think they are right.<sup>75</sup> Nonetheless, there are problems with their attribution. If one adheres to the rules of Latin syntax, the text reads: "Gratian of Chiusi, bishop." "Clusinus" cannot normally be applied to "Gratianus" and "episcopus" at the same time. If one can assume the scribe knew his Latin well, one can interpret the text as stating that Gratian from Chiusi was a bishop.<sup>76</sup> Winroth asserts that it is Magister Gratian because the name is not common.<sup>77</sup> That is not the case. He overlooked the fact that in the same necrology that has a modest number of names, there is another Gratian who is memorialized.<sup>78</sup>

The final problem with this entry in the Sienese necrology is that if this is the Gratian who compiled one of the most famous textbooks of the twelfth century and who taught canon law at Bologna for a long time, can

73. See, e.g., Johannes Faventinus's rubric to *Summa*, circa 1171, Klosterneuburg, Stiftsbibliothek fol. Ira ("Incipit prefatio in Decreta magistri G[ratian]i a, a magistri Jo[hannes] Faventino canonice ac dilucide edita ex duabus summis Ruffini et Stephani utili artificiosoque excepta"); *id.* fol. 1vb ("Circa liber autem quem pre manibus gestamus hec attendenda sunt, scilicet que sit materia Gratiani in hoc opera, que ipsius intentio, que utilitas que causa operis, que distinctio libri, quis modus tractandi, quis titulus.")

74. See Reali, *supra* note 58, at 96–97; Winroth, *supra* note 51, at 115–24.

75. See RACCOLTA DEGLI STORICI ITALIANI DAL CINQUECENTO AL MILLECINQUECENTO ORDINATA DA L.A. MURATORI 22 (Giosué Carducci, Vittorio Fiorini & Pietro Fedele eds., 1931) [hereinafter RACCOLTA DEGLI STORICI ITALIANI].

76. I do not completely exclude the possibility that the scribe did intend to write that Gratianus was from Chiusi and was bishop of Chiusi. Professor Anne Duggan has pointed out to me that Pope Gregory VII referred to another bishop of Chiusi, Lanfrancus, with the same syntactical phrase "confrater noster Lanfrancus Clusinus episcopus." DAS REGISTER GREGORS VII, in MONUMENTA GERMANIAE HISTORICA, EPISTOLAE SELECTAE 2.1 187, lines 13–14 (Erich Caspar ed., 1990); see also Noonan, *Gratian Slept Here*, *supra* note 1, at 153–54 (noting that circa 1162–1184 Robert de Torigny named Gratian a bishop of Chiusi). Professor Duggan told me that the information was in a later correction to Avranches, Bibliothèque municipale 159, though possibly made during Robert's lifetime. In any case, Robert's evidence is distant in time. Robert also thought Gratian was active circa 1130. Noonan thought that chronology was wrong. In this Essay I argue Robert's date is correct.

77. See Winroth, *supra* note 51, at 124 ("The name is unusual enough, however, that we may conclude that it is likely . . .").

78. See RACCOLTA DEGLI STORICI ITALIANI, *supra* note 75, at 17 ("Obit presbyter Gratianus prius plebanus de Folliano et post canonicus Senensis honestus clericus et bene litteratus, anno Domini MCC."). We will meet two more Gratians in the Venetian sources below.



we believe that he would have been given such a modest entry? It is much more modest than Anselm's and many others in the necrology. Would the Sienese scribe have given him no title, no descriptive adjectives, and no clues that he was a person of European wide fame? In the end, after reviewing the evidence, I think John T. Noonan would have concluded that, yes, Gratian was probably a bishop. When was he bishop? Difficult to say. Was he the bishop of Chiusi? The evidence, I think he would say, is inconclusive.

Another Gratian appears in a Venetian court case that was held in 1143. The case concerned tithes, a subject on which Master Gratian had more than a little expertise. The case has been in print for several centuries. Noonan thought it possible that this Gratian could be Master Gratian, but he thought it was only possible, "even plausible," but not certain. Recently, Gundula Grebner uncovered more evidence that would confirm Gratian's presence in a Venetian courtroom and change Noonan's plausible to certain.<sup>79</sup> Winroth accepts Grebner's argument. The issues of the case are only sparsely given, except that it concerned monks holding the rights to tithes. Grebner points out that Gratian dealt with that issue in his *Decretum* at C.16 q.7. The judicial sentence was rendered with the concurrence of "consilio Patriarce Aquilejensis et episcopi Ferrariensis et magistri Walfredi et Graciani et Moysis et aliorum prudentum" (with the counsel of the Patriarch of Aquilea, the bishop of Ferrara, Master Walfredus, Gratian, Moses, and other prudent men).<sup>80</sup> Again, the question: can this be Master Gratian, the Father of Canon Law, the compiler, by this time, of a famous book? The hesitations are some of the same as they were for the necrology in Siena. Walfredus, the Roman lawyer, is given the title "magister." Gratian is not. Gratian would have been, in 1143, at the end of his life, having taught canon law at Bologna for almost twenty-five years. Would he not have received at least some recognition of his contributions to Bolognese legal culture? I think so. Furthermore, there is another Gratian whom Noonan, Grebner, and Winroth did not know in the Venetian court records who participated in a case in 1150.<sup>81</sup> In spite of having a cognomen in 1150, he may be the same Gratian who heard the 1143 proceedings—or another Gratian. In any case, as in 1143, he heard the case with a master but is not given that title. It is also another piece of evidence that every Gratian is not Gratian.

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79. See Gundula Grebner, *Lay Patronate in Bologna in the First Half of the 12th Century: Regular Canons, Notaries, and the Decretum*, in *EUROPA UND SEINE REGIONEN: 2000 JAHRE RECHTSGESCHICHTE* 107–22 (Andreas Bauer & Karl H.L. Welker eds., 2007).

80. See FLAMINIO CORNARO, *I ECCLESIAE VENETAE ANTIQVVS MONVMENTIS NUMC ETIAM PRIMV EDITIS ILLUSTRATAE AC IN DECADES DISRIBVTAE* 378 (1749) (entry dated Aug. 31, 1143).

81. See *Gratianus Contarenus et Magister Lanfrancus de Brissia*, in *CODICE DIPLOMATICO PADOVANO DALL'ANNO 1101 ALLA PACE DI COSTANZA (25 GIUGNO 1183)* (Andrea Gloria ed., 1879). Gloria prints the 1143 case on page 313, number 419.

The man in Venice is someone who has, perhaps, training in canon law, but he is very likely not the Father of Canon Law. Noonan is right: after you strip away the myth and dubious evidence, Gratian is a shadowy figure. I think that Noonan would agree that Gratian was probably a bishop—but where, and more importantly, when? Was he a bishop-elect at the end of his life? He could not have been a bishop and teaching and compiling his textbook while he was in Bologna.

As we have seen, speculation without any or much evidence has dominated the debate about Gratian for the past ten years. I would like to exercise my right to speculate about Gratian too. If all my guesses and uncertainties in this Essay about Gratian's work and life were to be confirmed as fact, this is the story we might have (remembering that I label these remarks a conjectural novella): Gratian began teaching circa 1125–1130 using a text that looked something like the St. Gall manuscript. He expanded his text circa 1133–1135. He added circa 1500 canons, including some canons from Innocent II's conciliar legislation prior to Lateran II. They derived from Innocent's other councils or letters. He became bishop of (pick a city, maybe Chiusi). Around 1135, Italian canonists (maybe even Gratian himself?) provided a primitive set of glosses to his text that circulated in the earliest manuscripts. He composed a final part of the *Decretum* on sacraments, *De consecratione*, circa 1140. This additional text is very unsophisticated in comparison to the rest of his work and very old-fashioned: it contains just one dictum and 405 texts. If Gratian compiled it, he could have done it quickly and without much thought or effort. Does this story fit the possible facts? Yes. Is it true? As I hope this Essay suggests, some of these conjectures are more plausible than others. Let's wait and see whether the scholarly world of Gratian's followers reaches a consensus. It may take time.

Gratian would move from the shadows to the brilliant and shadowless light of day only in the fourteenth century when Dante put him in *Paradiso* Canto 10, 97–103:

Questi che m'è a destra più vicino, frate e maestro fummi, ed  
esso Alberto è di Cologna, e io Thomas d'Aquino.

Quell'altro fiammeggiare esce del riso di Grazian, che l'uno e  
l'altro foro aiutò sì che piace in paradiso.

Those who are to my right were my brother and master, Albert  
from Cologne and I Thomas Aquinas.

That other person with the light shining from his smile, is Gra-  
tian, whose contributions to the secular and the ecclesiastical  
courts has pleased Paradise.<sup>82</sup>

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82. DANTE ALIGHIERI, *PARADISO*, Canto 10: 97–103. Francesco Calasso followed Ruffini and Brandelione in their conviction that Dante meant the internal and external forum in this passage. See FRANCESCO CALASSO, *MEDIO EVO DEL DIRITTO* VOL. 1: *LE FONTI* 396 (Giuffrè ed., 1954). Dante's son, Pietro Alighieri, thought his father meant the secular and ecclesiastical courts. Gratian did not just

Dante knew nothing about Gratian's life. He did know that Gratian composed a book known to every educated person in Europe. He knew it was a book that every student of law studied and that it influenced the development of ecclesiastical and secular jurisprudence. Dante imagined that Gratian sat in heaven with Albertus Magnus and Thomas Aquinas at his side. He may have also known that Albertus and Thomas both used Gratian's *Decretum* in their great *summae*. Do we have to know more about Gratian than Dante knew? Maybe not.

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deal with ecclesiastical courts in his *Decretum*. I follow Pietro and thank Orazio Condorelli for this bibliographical information.

2014]

“TO ERASMIANS, EVERYWHERE”: REFLECTIONS ON THE LIFE  
AND WORK OF JUDGE JOHN T. NOONAN, JR.

REVEREND MICHAEL SWEENEY, O.P.\*

I regard it as a singular honor and privilege to have been invited to speak in celebration and in honor of the contribution to the Church and society of John Noonan.

I begin by noting that Judge Noonan dedicated his very important work on the development of moral teaching in the Church “[t]o Erasmians, Everywhere.” When I first read his text I wondered of whom he was thinking: was it of Erasmus who was reluctantly consecrated as a religious and who, for the rest of his life, attempted to be a layman instead? Or was it of Erasmus the scholar who disdained scholastic conventions that overlooked the pure rendering of Scripture and the tradition that a deeper scholarship might afford? Or, perhaps, was it of Erasmus who, remaining aloof from the violence of his age, managed to disappoint everybody? Of course, John himself satisfied my wonder: “Erasmus must stand as one of those ‘great minds,’ recognized by John Paul II, as ‘truly free and full of God,’ who were in some way able to withdraw from the climate of intolerance [that characterized his age]. . . . Erasmus’ lone voice was lost in the storm.”<sup>1</sup>

Judge Noonan’s is not a voice to be “lost in the storm.” At the same time, I suspect that we would do him insufficient honor were we to overlook the fact that he is very much as capable of being provocative as was Erasmus. I wish to call out two remarks of Judge Noonan that, in my view, open a horizon through which we can appreciate one aspect, at least, of the significance of his work on behalf of the Church. In his *A Church That Can and Cannot Change*, John remarks that, with the determination of Bl. John Paul II that slavery is intrinsically evil, the hierarchy had finally caught up with the moral consensus of the lay faithful. His remark invites us to wonder how it is that this recognition was so long in coming. Then, in the same work, he notes that the insistence upon the inviolability of human freedom articulated in *Dignitatis Humanae* was not accompanied by any sort of acknowledgment of the fact that such a freedom had been violated for centuries when the Church, both in theory and in practice, condoned capital punishment for heretics. Whence, he invites us to wonder, is the reluctance to admit that, in centuries past, the Church appears to have got it wrong? We might further wonder how it is that, after centu-

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1. JOHN T. NOONAN, JR., *A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL TEACHING* 153 (2005).

ries of having gotten it wrong, at Vatican Council II the Church finally got it right.

I propose that these rather troubling questions can be addressed by contemplating a realization on the part of the Council fathers that, most especially in their moral teaching, those who speak for the Church are only partially attentive to the ferment of the Spirit in the affairs of humanity when they neglect to consult the lay faithful. We can say, without a trace of hyperbole, that at Vatican II the hierarchy finally saw the necessity of consulting men like Judge Noonan and others who are preeminently competent to speak of secular things, because it is possible to speak of secular things with the authority of Christ. What, exactly, does this entail?

More than a decade prior to the Council, Fr. Yves Congar, O.P. had remarked that, in order for the contribution of the laity to be acknowledged, the Church had to come to a double realization: first, there is a world out there; and second, it is not the Church. I would propose a corollary realization: that the world out there will remain the world and should not be the Church; that the invitation Christ extends to all humanity to be gathered into his Body the Church does not mean that the world must cease to be the world. The world, according to the Council, is the dwelling place of the Church and, in some measure, defines her mission: the Church dwells in the world for the sake of the world. In other words, the worldliness of the world—the properly secular—is itself to be transformed in Christ and the Church and therefore has, according to the insistence of the Council and the subsequent papal magisterium, a properly secular dimension.

How are we to think of this properly secular dimension of the church? To borrow again from Fr. Congar: “The Church is one, but with a unity of fullness,”<sup>2</sup> and the fullness of the Church includes a properly secular dimension. As such, some elements of the body of the Church exist outside it: “[T]here exists a field . . . which is, by the essential condition of creation, a field of Christ, of the Church, a possession of Catholicism; but it is also, by its intrinsic nature, a field common to all . . . .”<sup>3</sup> So we read in St. Paul to the Romans: “For creation was made subject to futility, not of its own accord but because of the one who subjected it, in hope that creation itself would be set free from slavery to corruption and share in the glorious freedom of the children of God.”<sup>4</sup> If this is so, then the moral teaching cannot have as its sole concern the unity of the Church that is the first concern of its pastors, whether expressed in: the comportment of Christians toward participation in the sacramental life of the Church; or the creation of a secular society that conduces toward the sacramental life of the Church; or even participation in a secular society that is not inimical to the sacramental life of the Church. Rather, the vindication of the

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2. YVES CONGAR, O.P., *CHRISTIANS ACTIVE IN THE WORLD* 148 (1968).

3. *Id.* at 151.

4. *Romans* 8:20–21.

destiny of the human family and with it the field of things that are common to all must remain a concern in its own right.

It is this field of things that are common to all that Judge Noonan both explicitly and implicitly addresses. He rightly points out that it is impossible to address these things apart from intimate participation in them. He notes:

The ordinary moral theologian makes available to his readers little of his life. The typical theologian, prior to 1960, was male, celibate, and ordained. He probably had not had the sexual odyssey of an Augustine or the military odyssey of a Håring, and he would not likely have had the intellect of an Aquinas. He would have in adolescence entered on study for the priesthood, and more likely than not would have been the member of a religious order, which had chosen him to study moral theology. As a priest he would, until recent times, have been subject to ecclesiastical censorship of what he wrote. . . . Limited by their training and by censorship, often with limited experience of the world, the moral theologians generally entered on the exposition of moral theology by following in the steps of their predecessors. In this way a tradition was constructed.<sup>5</sup>

I might add that the tradition constructed in this way does not sound terribly promising.

What is clearly lacking is an engagement with secular life. This matters. If I may, I will reflect for a moment from my own experience.

Several years ago I was invited by one of our students to visit with him at his family ranch in Arizona. While there, he took part in the various chores around the ranch and I offered my help. The “help” that I was able to afford him was, to put it in the very best light, well intentioned. Prior to my visit my idea of a cow was of a docile and rather stupid unhorned creature, languidly chewing its cud. These cattle were frisky, horned, and skittish toward dangerous. My friend, making a prudential judgment of my yet untested abilities, determined that a truck was a likelier, if more limiting, choice than horseback as a means of transportation. He suggested one afternoon that we go skeet shooting. I had never shot a rifle in my life and discovered, during that adventure, that I am left eye dominant; as I tried and failed to line up the site on the rifle, he informed me, with humiliating patience, that I had the wrong eye opened. I did shoot one skeet—on the ground as a target, not flying—by accident. Having entangled myself in rope fence closures, having been cautioned lest, moving too suddenly, I should cause a stampede—that, thankfully, was averted—and in myriad other ways demonstrating a complete lack, not only of competence but of aptitude for conducting myself on a ranch, I found myself more and more desirous of gathering my hosts and beseeching them to

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5. NOONAN, *supra* note 1, at 205.

believe that there is an area of my life in which I am considered to have attained a modest degree of accomplishment. I am not at this or any moment contemplating a treatise on the moral requirements of life on the ranch.

While my example is admittedly trivial, the incapacity to which it speaks is not. What is the basis of this incapacity? As Judge Noonan has articulated, it consists in a failure of love. Immediately following his dedication “[t]o Erasmians, Everywhere,” he cites St. Paul to the Philippians, “And this I pray: That your love abound more and more [i]n knowledge and in insight of every kind [s]o that you test what is vital.”<sup>6</sup> I am capable of esteeming, albeit from a great distance, the competence required to run a ranch. I am not capable of loving the ranch or, for that matter, the ranch hands in so far as they are ranchers. (I speak as a celibate male, ordained, a member of a religious order, lacking the intellect of Thomas Aquinas, exactly as Judge Noonan described me). Moreover, I am precluded by my very office of even the opportunity to come to know a ranch and the ranch hands insofar as they are ranchers—my office concerns teaching, sanctifying, and governing within the Christian community as a coworker of the Bishop—and as St. Thomas Aquinas insists, what I do not know I cannot love. Nor, I would add, am I capable of prudential moral judgment if love is lacking. Love concerns always what is particular, what is concrete, what is actual and never what is merely general, abstract, or notional. The moral order itself concerns human action and the term of every act is something particular, concrete, and actual. The love of Christ is a love that designates, elects, chooses, calls forth, names. If I am to have knowledge of what it is to ranch and what it is to love a ranch, then I am fully dependent upon the testimony of those whose knowledge is born of love, in this instance, the ranchers themselves. And it is to them that I must refer in any moral judgment I might make concerning the responsibility of ranchers.

But there is more. The Church dwells in the world for the sake of the world; the world and creation itself have a destiny that only Christ fully reveals, and he has entrusted that revelation to the Church; only knowledge of the world born of love can therefore satisfy the Church’s mission. For this reason, following the Council fathers, John Paul II did not hesitate to designate the lay function in the Church as a participation in the priesthood of Christ:

The lay faithful are sharers in the *priestly mission*, for which Jesus offered himself on the cross and continues to be offered in the celebration of the Eucharist for the glory of God and the salvation of humanity. Incorporated in Jesus Christ, the baptized are united to him and to his sacrifice in the offering they make of themselves and their daily activities. . . . “Thus as worshipers

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6. *Id.* at vii (quoting *Philippians* 1:9–10).

whose every deed is holy, the lay faithful consecrate the world itself to God.”<sup>7</sup>

This, it seems to me, is the crux of the matter: the popes and even the Saints who condoned slavery were, in one sense, incapable of seeing it. As Judge Noonan shows, the first interventions on behalf of slaves had to do, not with the fact itself of their condition as slaves, but with their participation in the sacramental life of the Church. Could a slave be fully a Christian? Certainly yes, on the authority of St. Paul. Many of the first Christians were, in fact, slaves. Should the sacrament of marriage be honored between Catholic slaves? A qualified yes. Should Catholic slaves be the property of non-Catholics? No, they should not. Concern was certainly expressed for the spiritual life of the slave. Yet, as Judge Noonan relentlessly points out, something essential was overlooked, not seen: ironically, the very fact of slavery itself. For Pope Gregory the Great, Judge Noonan writes: “In actual practice [slavery] is not an intrinsically evil but a usefully available institution. . . . Gregory is not upset by the enslavement of human beings.”<sup>8</sup> What is clearly missing in Gregory’s view is an appreciation, born of love and therefore of knowledge, of life in the world for its own sake. True, Christ himself became a slave for our sake, but he did so freely. True, Pope and bishops are slaves of the Master, but their slavery is, as Judge Noonan insists, metaphoric. There is a difference between the office of standing *in persona Christi capitis* to govern, teach, and sanctify the Christian faithful and the exercise of the priesthood of Christ that consists in consecrating the world itself to God, the royal priesthood. That difference controls what is loved and therefore what is seen. It also suggests a difference in moral judgment.

That this is the case is, I believe, manifested in the fact that the difference persists. Just as there is a difference in function between the priesthood of the ordained and the priesthood that is common to the baptized, so there is a difference between religious and lay sensitivities. St. Teresa of Calcutta, possibly to a greater degree than anyone else in our generation, manifested a solicitude for the poor. Yet she refused participation in any program on their behalf. Her concern was not the alleviation of poverty as such but the dignity of each human person in whom she saw reflected the image of her Lord. Her sisters serve the Lord Jesus in the poorest of the poor. Yet the alleviation of poverty as such by means of a preferential option for the poor that necessitates change in economic and social policies is a requirement of government and a work that the pastors of the Church commend particularly to the lay faithful.

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7. POPE JOHN PAUL II, CHRISTIFIDELES LAICI ¶ 14 (1988) [hereinafter CHRISTIFIDELES LAICI] (citations omitted), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_30121988\\_christifideles-laici\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_30121988_christifideles-laici_en.html).

8. NOONAN, *supra* note 1, at 40.



Judge Noonan has wonderfully manifested the exercise of the royal priesthood. It has required of him a double fidelity: to Christ revealing himself through the Church in her Scriptures and liturgy and to Christ offering himself for the sake of the world in order that the world might be redeemed in Him. Through the prism of participation in the common priesthood of Christ the world takes on an entirely different meaning and significance:

*The “world” . . . becomes the place and the means for the lay faithful to fulfill their Christian vocation, because the world itself is destined to glorify God the Father in Christ. The Council is able then to indicate the proper and special sense of the divine vocation which is directed to the lay faithful. . . . [T]o be present and active in the world is not only an anthropological and sociological reality, but in a specific way, a theological and ecclesiological reality as well. In fact, in their situation in the world God manifests his plan and communicates to them their particular vocation of “seeking the Kingdom of God by engaging in temporal affairs and by ordering them according to the plan of God.”<sup>9</sup>*

Accordingly, for one possessed of the priestly character of Christ, life in the world is not a circumstance, but a divine vocation: each one is “called there by God.”<sup>10</sup> We should note, in passing, that Bl. John Paul proposes that every Christian vocation is, in its naissance, secular in character.

To offer oneself for the sake of the world requires that one love the world for its own sake, to see it with Christ in whom the world came to be and in whom it will reach its fulfillment. This, in turn, requires the exercise of moral judgment and, as Judge Noonan has said, an appreciation of what can and cannot change.

In this regard, I would like to invite us to reflect upon what it is that unifies our moral judgment. The realm of morality is the realm of human action and the term of every act is an end that is particular. As St. Thomas taught, one cannot have a science of particulars. For this reason, what unifies our moral vision is the exercise of virtue—the virtue of prudence and then the virtue of justice—and therefore the exercise of habits. The just man or woman is one who habitually judges well concerning what is due to another. This is very precisely why justice must be born of love, that is, of an attentiveness to the particular, concrete, and actual circumstance of another who is appreciated for his or her own sake. The moral teaching is not the elaboration of an idea but a reflection upon the lived experience of the Church in time. It is an attempt to articulate principles of action. As such, and as Judge Noonan has insisted, the moral teaching

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9. CHRISTIFIDELES LAICI, *supra* note 7, ¶ 15 (citation omitted).

10. POPE PAUL VI, LUMEN GENTIUM ¶ 31 (1964), available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19641121\\_lumen-gentium\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html).

not only admits of the possibility of development over time, but insists upon it.

Perhaps, ironically, what has most changed in the wake of Vatican Council II is a much deeper appreciation of what cannot change. In situating the role of the laity as a participation in the priesthood of Christ, the Council insisted upon the urgency to see and judge with him. For that reason, engagement with the world, which is preeminently the responsibility of the lay faithful, has as its measure the love of Christ. This is precisely where Judge Noonan directs us: “Development proceeds directly by this rule. The love of God generates, reinforces, and seals the love of neighbor. What is required is found in the community’s experience as it tests what is vital. On the surface, contradictions appear. At the deepest level, the course is clear.”<sup>11</sup>

To stay the course requires both courage and competence. And, as a matter strict justice, courage, and competence invite, or rather require, our gratitude. We well know that there can be no fidelity without courage, for to be faithful requires that we look and not look away, that we remain, that we stay in relationship and we give witness to what we see, regardless of the cost. We would be lacking in our appreciation and our gratitude to Judge Noonan were we to fail to see his insistence upon engaging the world as a fully ecclesial act. Just as the ordained priest stands *in persona Christi* in his sacramental ministry, so the lay faithful stand *in persona Christi* as they embrace the world in all of its fallenness and thereby “work to renew the world from within, as a leaven.” Precisely because each of the baptized participates in the one priesthood of Christ, in the exercise of the common priesthood, each is united with the whole Church.

*The reality of the Church as Communion is . . . the integrating aspect, indeed the central content of the “mystery[,”] or rather, the divine plan for the salvation of humanity. . . . The Church as Communion is the “new” People, the “messianic” People, the People that “has, for its head, Christ[;] as its heritage, the dignity and freedom of God’s Children[;] for its law, the new commandment to love as Christ loved us[;] for its goal, the kingdom of God . . . established by Christ as a communion of life, love and truth.”<sup>12</sup>*

The integrity that Judge Noonan has shown in the conduct of his office must be acknowledged as an act on behalf of the whole Church; he has acted for us and in our name.

Similarly, faithfulness to the world demands competence; the world must be engaged on its own terms. Like Erasmus, Judge Noonan stands among the most accomplished scholars of our generation. The gratitude that competence requires is best expressed in trust; we are invited or, better, required to seek his counsel.

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11. NOONAN, *supra* note 1, at 222.

12. CHRISTIFIDELES LAICI, *supra* note 7, ¶ 19.

One who loves the world in the manner of Christ is one who is wedded to the truth—not merely the truth of propositions, but the truth about creation and the truth about the supernatural destiny of the human person. Yves Congar once remarked: “There are persons in whose presence it is not possible to lie.” Because he has committed himself to life in the world; because he has looked upon the world with Christ; because he has clearly seen the dignity of secular pursuits, how they are ordered to the human person, and has offered them through Christ to the Father; because he has been faithful to men and to women—that he has remained with them, that he has looked and has not looked away; precisely for these reasons, Judge Noonan has become one in whose presence the truth about the person is made known, one in whose presence it is not possible to lie. I can think of no greater tribute to John than to pray that when we are called to stand before the Father this might be said of each of us.

## READING JOHN NOONAN

JOSEPH VINING\*

JOHN Noonan has done more than any in our time to save law and the rule of law for those who more and more are looking to it around the world, more to brace those who in reading him sense that they are reading themselves as they would wish to be, and more to speak the truth to those who cannot bring themselves to speak it. I want in this tribute to touch on the ways Noonan has been bold and true, and do so in the course of a brief look at two of his books—*Persons and Masks of the Law* from 1976,<sup>1</sup> and *A Church That Can and Cannot Change* from 2005.<sup>2</sup>

## I

Noonan takes readers of *Persons and Masks* to the basis of thought: “[S]ome vision of the construction of the universe will be found to underlie anyone’s account of law.”<sup>3</sup> People did not reach so far in 1976.<sup>4</sup> It would have been shocking to most if they heard themselves saying anything like this. But it is true. I think we all know it is true, which leaves us individually to ask what our vision is of the construction of the universe. Each of us has a sense of it, however deep down in us it is. What do we think we think, and what do we actually think?

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1. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* (2002) [hereinafter *PERSONS*].

2. JOHN T. NOONAN, JR., *A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL TEACHING* (2005) [hereinafter *CHURCH*].

3. *PERSONS*, *supra* note 1, at 71–72.

4. Unless, that is, they were trying to grasp the life and thought of Oliver Wendell Holmes. In 1977, Holmes’s third official biographer, Grant Gilmore, described the world as imagined by Holmes as “bleak and terrifying” and Holmes himself as “savage, harsh, and cruel.” GRANT GILMORE, *THE AGES OF AMERICAN LAW* 49 (1977). But cruelty was meaningless in the world in which Holmes tried to live or thought he lived, since it was without persons, or indeed individuals. Law, for Holmes, was “like everything else” in the universe and “[t]he postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents.” Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897); see also JOSEPH VINING, *FROM NEWTON’S SLEEP* 274, 372 n.28 (1994) (discussing *The Path of the Law*); Joseph Vining, *The Cosmological Question*, 94 MICH. L. REV. 2024, 2025 (1996) (discussing Holmes’s definition of “Law” in *The Path of the Law*).

Gilmore died leaving the biography he had worked on for fifteen years unfinished and unpublished. The half-century effort to commission an official biography of Holmes was abandoned. See ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 31–33 (2000).

The lectures John Noonan began in 1971, that ultimately became *Persons*, were the Oliver Wendell Holmes Lectures of 1972.

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Many will be surprised at the difference between what they think they think as they make their way through life today, and what they actually think. They may find even foreign what they actually think, while they say and do what others who claim authority over them demand. Noonan knows that moving toward their actual vision will change the articulation of their thought, and with it their account of law and its authority.

Then Noonan points to love in the structure of the universe and to love's role in all moral feeling, thought, and development. "The central problem, I think, of the legal enterprise is the relation of love to power."<sup>5</sup> "[M]oral education," he adds, is "essential to the professional preparation of lawyers, who are to be formed less as social engineers than as the charitable creators of values."<sup>6</sup>

Again, use of the very word "love" in a professional setting would have been shocking thirty-eight years ago. If it is less so today, that is Noonan's achievement. He felt able to end his prominent response in 1998 to contemporary attempts to reduce law to economics, "[l]ove is not simply an emotion, a sentiment . . . . It is the Love 'that moves the sun and the other stars' that also moves Dante . . . ."<sup>7</sup>

## II

The universe. The love built into its very structure. Then the universality of fundamental human values:

So many of us struggle with how far what we take to be important and moral can be allowed to reach in our understanding of humanity as a whole. We wonder, even when we wish we did not, how grounded value is, how much discovered rather than created solely by us, how much it comes to us from beyond the conventions of our culture as well as from inside us. We cannot imagine warming to an abstract rule, and without our warmth it has no real authority for us. Our wondering extends back in time to the morality and meaning of our predecessors, as much as it extends to the other side of globe right now.

Noonan explores this common doubleness of mind throughout what he has given us. He especially takes up the first way the question of universality lives with us, and looks to the fact of change in moral and legal values over the course of history—change over time rather than over distance. "Development" is his word for it. Development in understanding what our predecessors have said and done affects the hold that old papers and old decisions have over us in our own thought and practice. The challenge to their hold on us pulls in legislation that seeks to initiate or confirm change too, for any document emerging from a legislature is dropped into an existing web of past understandings and decisions and

5. PERSONS, *supra* note 1, at xx.

6. *Id.* at xix.

7. John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768, 1775 (1998) [hereinafter *Problematics*].

must find its place there, categorized, colored, and channeled by them. How is it, Noonan asks, that the fact of change over time can be faced and accepted, without emptying the very notion and sense of authority in law and religious belief today?

Here I turn to Noonan's book a generation later, *A Church That Can and Cannot Change*. His principal subject is slavery and its movement from acceptance and maintenance by law and church, as "natural" even, to its recognition as "intrinsic evil" today, as without justification in any context, like torture.<sup>8</sup> He chooses the pervasive moral and legal issue that presents the phenomenon of change in its strongest form.<sup>9</sup> We believe enough in our own goodness and rightness to be able to do or be in on the doing of the terrible things we often do in law—kill, imprison with "civil death" in a known kind of hell, impoverish and bankrupt, rip children from the arms of a parent, torture animals, on and on. If those who gave us our Constitution and built the tradition of the Church, and who made decisions we follow today, did engage in intrinsic evil, and thought themselves good and right too, how can we allow even our own values to comfort and guide us?

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8. See CHURCH, *supra* note 2, at 5.

9. Chapter 2 of *Persons*, "Virginian Liberators," focused attention on Founding Fathers in Virginia, identified with the ideal of liberty and justice for all, actively engaging in maintaining and tightening Virginia's law of slavery. See PERSONS, *supra* note 1, at 29–64. "The Virginia paradox is the legal paradox, generally." *Id.* at 58. A year later, Noonan supplemented his historical treatment of the problem in *The Antelope*. See generally JOHN T. NOONAN, JR., THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS (1977). Chief Justice Taney responded to the paradox, or problem, in one way before the Civil War in *Dred Scott v. Sandford*, 60 U.S. 393 (1856). With seven justices joining his opinion, Taney quoted the Declaration of Independence: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness . . ." *Id.* at 410 (internal quotation marks omitted). He continued,

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others . . . .

*Id.*

I was raised in the South in the forties and fifties. The experience in our country of slavery maintained by law and lawyers did not end with the Thirteenth Amendment. The evidence was all around me, and there was no challenge from the churches also all around me.

I dealt with slavery in the reading I did on my own. I had Faulkner and Tolstoy to help me. I dealt with it in some intellectual way throughout my schooling. But I can say here, in confession and admiration, that I think I had never felt so connected personally with what slavery really meant until I read this book. I read absorbed. The book is beautiful in its form and in its sentences despite its chilling substance, as if Noonan were continually reminding the reader how human life can be lived. Its chapters and sections are like verses.

Noonan is generous to all at its end. Nonetheless, I have found myself since troubled too by the brutality of slavery in ancient Greece and Rome, those high civilizations, as we call them, on which so much of my education and taste were built. I wonder how I would have read Cicero's orations as a boy in school if I had been fully aware of the treatment of human beings that made them possible. I do not know how far the art, architecture, and literature of Greece and Rome can be separated from it, though I separate the Gospel and the early church from it and can work with Noonan's help to separate the tradition of the Church from it.<sup>10</sup> I do

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10. Among other contemporaries responding to this personal question of separation, the theologian and historian David Bentley Hart is especially helpful in setting it in its larger context. See, e.g., DAVID BENTLEY HART, *ATHEIST DELUSIONS: THE CHRISTIAN REVOLUTION AND ITS FASHIONABLE ENEMIES* (2009). In the introduction Hart remarks:

This book chiefly—or at least centrally—concerns the history of the early church, of roughly the first four or five centuries, and the story of how Christendom was born out of the culture of late antiquity. My chief ambition in writing it is to call attention to the peculiar and radical nature of the new faith in that setting: how enormous a transformation of thought, sensibility, culture, morality, and spiritual imagination Christianity constituted in the age of pagan Rome; the liberation it offered from fatalism, cosmic despair, and the terror of occult agencies; the immense dignity it conferred upon the human person; its subversion of the cruelest aspects of pagan society; its (alas, only partial) demystification of political power; its ability to create moral community where none had existed before; and its elevation of active charity above all other virtues. Stated in its most elementary and most buoyantly positive form, my argument is, first of all, that among all the many great transitions that have marked the evolution of Western civilization, whether convulsive or gradual, political or philosophical, social or scientific, material or spiritual, there has been only one—the triumph of Christianity—that can be called in the fullest sense a “revolution”: a truly massive and epochal revision of humanity's prevailing vision of reality, so pervasive in its influence and so vast in its consequences as actually to have created a new conception of the world, of history, of human nature, of time, and of the moral good. To my mind, I should add, it was an event immeasurably more impressive in its cultural creativity and more ennobling in its moral power than any other movement of spirit, will, imagination, aspiration, or accomplishment in the history of the West. And I am convinced that, given how radically at vari-

believe it was as evil then as it is today, as he believes. I know, as does he, that necessary to this belief is belief in the universality of fundamental human values, on which any sense of melioration and progress depends.

Of course, there are doubts about the universal in anything human and about progress in moving toward a humane world. However hard we work for betterment in the particular ways we do, I think most of us carry the burden of these doubts when we reflect on what we have achieved or failed to achieve for others than ourselves. But this is the beauty of Noonan's addressing our conflict by focusing on change:

It is by reflection on the promptings of love that morality begins, that the requisite human response to the human stranger . . . becomes clearer. . . . By experience, by analogy, by more inclusive seeing, and also by argument, reasoning, and moral theorizing, morality is developed . . . .<sup>11</sup>

The course of moral doctrine, like that of [a] great river, appears to follow no rule. Plunging over heights, striking boulders, creeping in almost motionless channels, it defies prediction, can scarcely be the subject of science. . . . [It is t]he testing of what is vital . . . . What is required is found in the community's experience as it tests what is vital. On the surface, contradictions appear. At the deepest level, the course is clear.<sup>12</sup>

Hearing Noonan's eloquent voice as I read *A Church That Can and Cannot Change*, I recalled the effect on me of discovering Václav Havel's address to the Canadian Senate and House of Commons in 1999. Noonan was giving me that experience again. "I have often asked myself," Havel said at the end,

why human beings have any rights at all. I always come to the conclusion that human rights, human freedoms, and human dignity have their deepest roots somewhere outside the perceptible world. These values are as powerful as they are because, under certain circumstances, people accept them without compulsion and are willing to die for them, and they make sense only in the perspective of the infinite and the eternal. I am deeply convinced that what we do, whether it be in harmony with our conscience, the ambassador of eternity, or in conflict with it, can only finally be assessed in a dimension that lies beyond that world

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ance Christianity was with the culture it slowly and relentlessly displaced, its eventual victory was an event of such improbability as to strain the very limits of our understanding of historical causality.

*Id.* at x–xi.

11. *Problematics*, *supra* note 7, at 1775.

12. *CHURCH*, *supra* note 2, at 221–22.



we can see around us. If we did not sense this, or subconsciously assume it, there are some things that we could never do.<sup>13</sup>

### III

The universe. The human universal. Love. The last of the large subjects of Noonan's work I want to notice here is the person in legal thought.

Let us turn back to *Persons and Masks of the Law*. The more general subject of *A Church That Can and Cannot Change* is the place of authority in a world of change and development. In *Persons and Masks of the Law*, Noonan focuses directly on the question of the person and the personal.

The reception of the 1976 edition of the book had been such that it was republished in 2002, with Noonan adding a new Preface to his 1976 Foreword. His Foreword describes his principal subject as “the place of the person in the understanding of law . . . with the purpose of bringing at least some ‘professionals’ into the camp of the ‘humanists.’”<sup>14</sup> His new Preface to the 2002 edition describes the book’s “central question” as “the place of rules in the legal system if the process takes persons into account.”<sup>15</sup> He adds, “[t]he book, as will be seen, defends rules as indispensable.”<sup>16</sup>

Were it not for his subsequent reference in the new Preface to the rarity of his dissents (3.4%) in judging the cases he had heard since joining the Ninth Circuit Court of Appeals in 1985, and the examples he gives of situations where more attention might be paid to persons in a case, one might think that the 1976 Foreword and the 2002 Preface are offering two ways of stating the same question.

His 2002 examples include forms of address and reference in speaking and writing. He calls them “modest ways” of paying attention to persons.<sup>17</sup> Beyond those, there are the examples of close cases, cases where “the precedents are varied or unclear,” and particular areas of law where this is done—sentencing in criminal law, asylum petitions, cases involving

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13. Václav Havel, *Kosovo and the End of the Nation-State*, THE N.Y. REV. OF BOOKS (June 10, 1999), <http://www.nybooks.com/articles/archives/1999/jun/10/kosovo-and-the-end-of-the-nation-state/?pagination=false>. The extraordinary work of the well-known internationalist, Philip Allott, builds a legal world in which the universal is recognized and realized. See, e.g., PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* (2d ed. 2001); PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* (2002); see also Philip Allott, *Law and the Challenge of the Transcendental: Rethinking the Order of All Order*, HARVARD LAW SCH., INST. FOR GLOBAL LAW & POL’Y WORKSHOP, (Jan. 4–14, 2013), available at <http://www.trin.cam.uk/show.php?dowid=1614>.

14. PERSONS, *supra* note 1, at xvi.

15. *Id.* at x.

16. *Id.*

17. *Id.* at xi.

religious freedom, and cases involving sovereign immunity.<sup>18</sup> Against the panoply of the whole of law these would seem rather modest also.

Indeed, there is something of an impression left by the 2002 Preface of modulation and pulling back from the passion that drove the ending of the 1976 Foreword that he wrote when he wrote the book:

[Law is] a human activity affecting both those acting and those enduring their action. The analytic bent of most of those now so engaged leads them to reduce “person” to a congeries of “rights,” with the highest ideal, if any is expressed, to do “justice” by enforcing the rights. . . . But it is necessary to insist that the person precedes analysis, and to seek to do justice in the narrow sense is no more a full human aspiration than such justice is the sum of human virtues.<sup>19</sup>

But we have beside us *A Church That Can and Cannot Change*, if we wonder what to do with such an impression. It appeared shortly after the new 2002 Preface, in 2005, and there is certainly no pulling back in it. *Persons and Masks of the Law* remains a radical book, as radical read today as it was in 1976.

“The person precedes analysis,” at the end of the 1976 Foreword just quoted, is, I think, the critical perception. The mere enforcement of abstract rights connected to abstract entities on either side of a case fails to do justice, except in a sense that bleeds justice of its meaning. The object of a legal system with true authority is law and justice both.

In fact, “law and justice” is a phrase heard often today. The object of “the law” is commonly described in this way. Behind the combination of law with justice is a long institutional history, the present outcome of which is part of the context of Noonan’s radical call to look and to see.

There was at one time a court called a court of law, in which rules were enforced by sanctions, and another court called a court of equity or the Court of Chancery, to which those injured by the way rules of law worked could turn and be heard with arguments that a particular outcome was unjust given the full circumstances of the case and its participants. Both courts were august, sitting in their own palaces. The Law Lords had such remedies as were spelled out in the rules. The Lord Chancellor representing the sovereign had his own remedies, “equitable remedies”—injunctions, “constructive” trusts, restitution. The rules, which were called “law,” were applied. The court of equity was at hand to do “justice.”

Then, over time, the two courts were merged into one court. The Law Lord and the Lord Chancellor became one judge with two roles. Then “law” and “equity” themselves, two mentalities each with their supporting body of precedents, were merged in jurisdiction after jurisdiction. The two roles of the judge were merged into one with now both sets of

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18. *Id.* at x–xiii.

19. *Id.* at xix–xx.

remedies available. In the federal system this happened in 1938,<sup>20</sup> the year I was born and therefore by definition recently. In Virginia the merger took effect in 2006, very recently.<sup>21</sup>

This is not Noonan's account. He is too good a historian to link what he sees to this legal development, which may have been meant to be one of nomenclature only. I mention it as a device to help us grasp Noonan's purpose and vision. In this merger of "law and equity," a law of rules and abstractions might have swallowed a law of justice without digesting it. What Noonan presents is an "understanding of law"<sup>22</sup> in which a law of justice swallowed a law of rules and did digest it. Justice became part of what was sought and what was argued and what was taught in every case. In every case: this is what makes Noonan's perception remarkable, radical, and true. Decision makers seeking guidance in the body of legal texts and hoping they may be able to say they find a rule in them, must also take into account the actual persons involved in the case and their circumstances, "invoking," as he says, "a tradition of equity jurisprudence with which so much that I have written here has affinity."<sup>23</sup> Who the defendant is, who the plaintiff is, how they came to their places in court, who is presenting the arguments, are among all the particulars of the case that may be relevant. Though "it would be a travesty of what I believe," he says, "to suppose that law could exist without rules. At the intersection of rules and persons, the process to be understood occurs."<sup>24</sup> Again, Noonan writes in 1976, "my principal subject [is] the place of the person in the understanding of law"<sup>25</sup> and in 2002 "[t]he central question . . . is the place of rules in the legal system if the process takes persons into account."<sup>26</sup> "[T]he person precedes analysis" still.<sup>27</sup>

I might freshen the examples Noonan gives of cases in which the actual persons before the court are not seen, as a slave is not seen, with a recent case in Ohio. In 1994, Judge Allan Davis in the Hancock County Probate Court declared Donald Miller dead several years after he mysteriously disappeared, so that his ex-wife, Robin Miller, could apply for Social Security benefits for their two daughters. Nineteen years later, Mr. Miller showed up, wanting to apply for a driver's license and reactivate his Social Security number, and petitioned Judge Davis to reverse his declaration of

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20. See Charles E. Clark, *The Federal Rules of Civil Procedure 1938–1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 436 n.8 (1958). For a stimulating and engaged account of equity in English law and history, and of the treatment of equity in disciplines other than law, see GARY WATT, *EQUITY STIRRING: THE STORY OF JUSTICE BEYOND LAW* (2012).

21. See W. Hamilton Bryson, *The Merger of Common-Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 77, 77 (2006).

22. PERSONS, *supra* note 1, at xvi.

23. *Id.* at 98.

24. *Id.* at 19.

25. *Id.* at xvi.

26. *Id.* at x.

27. *Id.* at xx.

death. A lawyer for Mrs. Miller, James Hammer, opposed the petition on the ground that she might have to return the benefit payments received from Social Security and did not have the money to do so. Judge Davis ruled that Ohio law does not allow a declaration of death to be reversed after three years or more have passed. “[Y]ou’re still deceased as far as the law is concerned,” he said to Mr. Miller sitting in the courtroom.<sup>28</sup> “I don’t know where that leaves you.”<sup>29</sup> The case, he said later, was decided “in strict conformity with Ohio law.”<sup>30</sup> Mr. Miller’s lawyer, Francis Marley, said Mr. Miller could not afford to appeal. He added, “[w]e hoped the judge would see the equity of giving his life back.”<sup>31</sup>

It remains to ask what or who the persons are that must be taken into account in decision-making in a legal system that does justice. Thinking and speaking of “persons” already extends quite far in our daily experience and may be spreading further.

Noonan uses the word “individual” from time to time. He speaks of “developing a sense of justice—a sense of what was due to particular individuals in a concrete situation.”<sup>32</sup> “By masks,” he says, “I mean ways of classifying individual human beings so that their humanity is hidden and disavowed. . . . [I]n any sociological analysis, the masks may be seen as devices reflecting the structure of society and the degrees of its acknowledgment of humanity in different groups.”<sup>33</sup> Contrasting masks and roles, he says:

Roles are as necessary for the display of human love as clothes for the display of human beauty. The naked individual rises to the communal expectations invested in the role . . . . No more than clothes does a role obscure the human visage. But as a hat can be pulled down to cover a face, so a role, misused, becomes a mask obliterating the countenance of humanity.<sup>34</sup>

The masks of the law are “[n]either individual projections nor objective artifacts, neither social roles nor literary disguises.”<sup>35</sup>

In speaking of the limitations of any quantitative understanding of law, he remarks, “It is difficult to persuade any individual human being that such abstractions are commensurate with himself or herself. The complex rationality of individuals escapes reduction.”<sup>36</sup>

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28. John Schwartz, *Declared Legally Dead, as He Sat Before the Judge*, N.Y. TIMES (Oct. 11, 2013) [http://www.nytimes.com/2013/10/12/us/declared-legally-dead-as-he-sat-before-the-judge.html?\\_r=0](http://www.nytimes.com/2013/10/12/us/declared-legally-dead-as-he-sat-before-the-judge.html?_r=0).

29. *Id.*

30. *Id.*

31. *Id.*

32. PERSONS, *supra* note 1, at xviii–xix.

33. *Id.* at 19, 23.

34. *Id.* at 21.

35. *Id.* at 25.

36. *Id.* at 164.

“Person” is used by Noonan almost as a synonym of “individual.” By “persons,” he says,

I mean particular flesh and blood and consciousness. I take as a starting point that we are such beings, that we encounter such beings, and that encountering them we recognize those who are in shape and structure, in origin and destiny, like ourselves. I assume that we have the experience of responding to persons.<sup>37</sup>

He asks, for his reader,

[A]re persons merely a collection of roles—husband, father, lawyer, etc.? I take persons to be ontological realities, perceptible through the roles, distinguishable from both roles and masks. . . . If a lawyer could not distinguish between real persons and fictional persons such as corporations or trees, he would not be capable of communication.<sup>38</sup>

As for “the law,” Noonan comments that “Holmes gave it a fictitious life. No person itself, the law lives in persons.”<sup>39</sup>

Readers will understand what Noonan has in mind in referring to persons as well as to individuals. “Person,” rather than “individual,” is the term of reference to human beings in the Constitution: there are “free persons, including those bound for service for a term of years,” “citizens,” “Indians not taxed,” and “all other persons.” “Other persons” is the Constitutional euphemism for “slave,” a word that does not appear in the Constitution until the Thirteenth Amendment, and slaves were to be counted in determining the population of a state for purposes of setting its number of Congressional representatives as three-fifths of a person. “Person” is also the primary term of reference in the Church, and it inhabits ordinary speech in many ways. It is a standard term in many areas of law.

But there are ambiguities in its general use, indicated by Noonan’s confidence that we are always able to see the difference “between real persons and fictional persons such as corporations or trees.”<sup>40</sup> A slave might be a person but not a “legal person.” In the awful words of Chief Justice Taney, speaking for the Supreme Court in 1856, a descendant of an American slave “had no rights which the white man was bound to respect . . . .”<sup>41</sup> By contrast, corporations were never “flesh and blood,” but

37. *Id.* at 26.

38. *Id.* at 27.

39. *Id.* at 4. Does human experience teach that real persons must be flesh and blood, or human? The law as Holmes describes it can have only a fictitious life. But in legal method and practice we cannot do without the presupposition of a caring and living mind beyond the individual. For some discussion on my part, see Joseph Vining, *DILEMMA: Faith and Failure*, in *THE AUTHORITATIVE AND THE AUTHORITARIAN* 45–60 (1988).

40. See *PERSONS*, *supra* note 1, at 27.

41. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856). Justice McLean replied in his dissent, “A slave is not a mere chattel. He bears the impress of his Maker,

they are legal persons. So are the great administrative agencies. Neither corporation nor agency can be reduced to the human individuals associated with them or speaking for them and constantly being replaced. Lawyers sue on their behalf, and they can be sued without individuals associated with them being drawn in.

In the case of corporations, including the Church, they have property of their own and not as in a form of trust. Human individuals often have quite limited claims on them or claims on them linked to fiduciary duties to them. Corporations claim, and are granted as persons today, some constitutional rights of their own. Beyond this, developments in criminal law have made them chargeable with serious crimes, the *mens rea* elements of which are corporate and apart from any individual's *mens rea*. When convicted, a corporation's sentence, which can include mandated change within and a period of oversight from without, can be set by its score on a "corporate culpability scale" and can be mitigated by "corporate remorse." The question of their "ontological reality" has become harder and harder to answer.<sup>42</sup>

The general difficulty is that persons are regularly made and unmade in the legal system. Noonan makes the point himself: "Legal education," he says, "has often been education in the making and unmaking of persons."<sup>43</sup> The subtitle of Colin Dayan's fine 2013 book, on law's collaboration in the perpetuation of slavery even today, is *How Legal Rituals Make and Unmake Persons*, which I judge from the book to be a reference and a tribute to Noonan.<sup>44</sup> In fact, the person in everyday life is made and sometimes unmade. The friend who is present to us, as a person we know, is half-constructed by us. Consciously, semi-consciously, or unconsciously, we are always sifting through what an individual says and does as an individual, and either identifying it with him or her as a person who exists over time, or putting it aside as mistake or inauthentic. We do the same with ourselves. You sit in judgment on what you say and do, wondering whether that was really you who said or did it.

Human individuality is not made and unmade. It is the first thing we know, and the last. It is not our uniqueness, though each of us is unique. That would not distinguish us from any river stone we might pick up. It is rather that about us that interferes, blunts, or stops others' quantitative

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and is amenable to the laws of God and man; and he is destined to an endless existence." *Id.* at 550 (McLean, J., dissenting).

42. For discussion of the question, see, what I think is still the finest piece in English on corporate purpose and the nature of a corporate entity, W.M. Geldart, *Legal Personality*, 27 L.Q. REV. 90 (1911); see also Joseph Vining, *Corporate Crime and the Religious Sensibility*, 5 PUNISHMENT & SOC'Y 313 (2003). But see Tracy Fessenden, *Response to Joseph Vining's 'Corporate Crime and the Religious Sensibility'*, 6 PUNISHMENT & SOC'Y 105 (2004). See generally ERIC ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* (2013).

43. PERSONS, *supra* note 1, at 58.

44. See COLIN DAYAN, *THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS* 2, 23, 264 n.37 (2011).

and utilitarian calculation in their treatment of us. The individual is not known to the natural sciences or the social sciences. It has no place in them. But the individual is known to theology, to psychiatry, literature and art, and to law.<sup>45</sup>

Readers who come to this wonderful book may assume references to the individual are references to the person. But the terms are not synonymous. I suggest that Noonan's meaning is served when "individual" comes to supplement "person" in the reader's mind. Thought of the person would be kept centered on our human condition as Noonan intends it to be. There are nonhuman persons all around us. There is also nonhuman flesh and blood and perhaps consciousness all around us—those animals who are being seen more and more as individuals in scientific work as well as in law, and who in law are therefore being protected more and more by statute and constitutional recognition.<sup>46</sup> Indeed, there is expressed fear today within the Institute of Medicine and the National Academies of Science that this rapid development of law governing human relationships with animals will end with some sentient animals being viewed as legal persons, with unquestioned ontological reality.<sup>47</sup> Noonan's powerful call to look and see is also a call addressed to the humane in us.

There is always the question of the place of roles in understanding the person's relation to the individual. Noonan observes, as we have noted, that a person is not a collection of roles, is perceptible through the roles, and is distinguishable from both roles and masks. He compares a role to clothes for the naked individual that help in active service to others. In distinguishing role from mask, he says, "The lawmaker and the judge and the litigant are all carrying out positions assigned them by society, all are the players of roles. They have not been identified with those parts."<sup>48</sup>

But a person does have an identity in his or her own eyes and in the eyes of others. It emerges from an individual's life and does not have the fictive quality that attends playing a part. Becoming a person is bringing purposes and values into one's world that connect one with other individuals in their worlds. One's purposes and values are not all one's own, and

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45. For further discussion, see Joseph Vining, *Dignity as Perception: Recognition of the Human Individual and the Individual Animal in Legal Thought*, in UNDERSTANDING HUMAN DIGNITY 573–90 (Christopher McCrudden ed., 2013) [hereinafter *Dignity*]; Joseph Vining, *The Consequence of Human Differences*, 5 J.L. PHIL. & CULTURE 21 (2010).

46. Noonan may indeed be referring to them as "beings" of particular flesh and blood, and consciousness. I take as a starting point that we are such beings, that we encounter such beings, and that encountering them we recognize those who are in shape and structure, in origin and destiny, like ourselves. I assume that we have the experience of responding to persons.

PERSONS, *supra* note 1, at 26 (emphasis added).

47. See *Dignity*, *supra* note 45; Joseph Vining, *Human Identity: The Question Presented by Human-Animal Hybridization*, 1 STAN. J. ANIMAL L. & POL'Y 50 (2008).

48. PERSONS, *supra* note 1, at 20.

they are not realized alone. They are in Noonan's words vital, fundamental, and can sometimes be worth devoting an entire life to, or dying for, as clothes and playing a part could never be. They call to us. They excite our imagination and creativity. They speak to us in a real way. Noonan ends the book with this speaking:

[Good purposes] exist now in living human persons recapturing the thought of past living persons. These purposes, and with it their vitality, their toughness, arise out of the lives of past persons; they speak to us out of those lives. Whether they are moral ideals or judicial opinions, they must be understood in the multiple contexts which enfold each individual's experience. The act of understanding enhances our power to discriminate between what was fundamental . . . and what was, even within their own framework, weakness or misapprehension or contingent solution. . . . Persons speak to persons, heart unmasked to heart.<sup>49</sup>

Thus, on the one hand, we have ourselves as individuals, each of us necessarily at the center of the world as he or she sees it and believes it to be, each with power to say "no" or "yes" to life, "no" or "yes" to the way the world is, "no" or "yes" to others' propositions about the world and to their actions in the world. On the other hand, we have ourselves as persons identifying with moral realities and aspirations that make us human in small ways and large. Each of us is a miraculous fusion of the two without the loss of either.

Might it not be this fusion that readies us for what Christ offers us? I hesitate, as a lawyer who is not a theologian, to speak so directly about divinity itself, to speak as I think John Noonan can. But let me just suggest that Christ's offer might be expressed as an offer to bring us, with a human identity by virtue of fusion of this kind, then into the divine presence in Him. In fusing our ineradicable individuality with a humanity that cannot be thought about or spoken of except by acknowledging the actual presence of other individuals, in being penultimately taken into values that exist beyond any of us individually and animate us in life, we move toward participation in the Divine. A double negative may for once actually help: the Divine a person, a person not utterly and completely unlike us.

Personal reflection on who or what a person is may lead some to such a thought as this. But Noonan does not assume or try to lead his readers toward the visualization of divinity on which the Catholic Church and Catholic imagination and practice are built. The works we have considered here are not works of theology and they are certainly not evangelizing. He is reaching to everyone. The experience of reading John Noonan is of opening more and more to the human in us and all around us, the possibility of a humane world growing with each perception.

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49. *Id.* at 167.





2014]

# Martin Luther King, Jr. Lecture

“*SKIN IN THE TAX GAME*”: INVISIBLE TAXPAYERS?  
INVISIBLE CITIZENS?

MILDRED WIGFALL ROBINSON\*

## I. INTRODUCTION

PROFESSOR Mullane, in extending this invitation to deliver the 2014 Dr. Martin Luther King, Jr. Memorial lecture here at the Villanova University School of Law, noted that she was seeking someone who could speak from an economic justice perspective informed by work done in the area of taxation.

As I seek to respond to her invitation, let me first establish a context. You will recall that at the time of his assassination in 1968, Dr. King was campaigning in Memphis, Tennessee on behalf of the city’s striking, predominantly black sanitation workers.<sup>1</sup> In Memphis at that time, more than one half of all black residents lived below the poverty line.<sup>2</sup> Comparatively, one in seven white Memphians lived below the poverty line.<sup>3</sup> “Four out of [ten] sanitation workers qualified for welfare, and they received no medical insurance, workers’ compensation, or overtime pay.”<sup>4</sup> The workers wanted improved working conditions, and they wanted to unionize.<sup>5</sup> Dr. King had long viewed racial injustice and economic injustice as inextricably intertwined.<sup>6</sup> But his proposals for redressing the conditions in which the sanitation workers lived and worked were, in terms of race, broadly cast. They included an economic and social bill of rights promis-

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1. See *Memphis 1968: Sanitation Workers’ Strike Spurs Cause of Economic Justice*, APWU MAGAZINE (2005), <http://apwumembers.apwu.org/laborhistory/05-1-memphissanitationworkers/05-1-memphissanitationworkers.htm>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* Even during his formative years, he viewed economic injustice as the inseparable twin of racial injustice. See generally Martin Luther King, Jr., “*My Pilgrimage to Nonviolence*,” FELLOWSHIP (Sept. 1, 1958), available at [http://mlk-kpp01.stanford.edu/primarydocuments/Vol4/1-Sept-1958\\_MyPilgrimageToNonviolence.pdf](http://mlk-kpp01.stanford.edu/primarydocuments/Vol4/1-Sept-1958_MyPilgrimageToNonviolence.pdf).

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ing *all* citizens the right to a job, adequate education, decent housing, and a minimum income.<sup>7</sup>

## II. ECONOMIC JUSTICE AND TAX BURDENS: WHY IT MATTERS . . .

There is no hint of direct concern for tax matters in any of this. Indeed, Dr. King may have been initially taken aback at the notion that concern for economic justice could extend to the ways in which we in this country *raise* revenue in addition to concerns regarding the ways in which we *use* those resources. But the importance of our taxing systems, writ large, cannot be overstated. Oliver Wendell Holmes quite likely said it best: “Taxes are what we pay for civilized society . . . .”<sup>8</sup> Given the centrality of raising revenues to financing our way of life, I submit that the ways in which we talk about and implement the tax laws allocating the *burdens* of this civilized society are just as important as the ways in which we use those resources to accord the *benefits* of living in this civilized society.

In fact, Holmes’s observation is quite powerful. Let’s think about his words a bit more. *TAXES . . . are what WE pay . . . for CIVILIZED SOCIETY*. These words are carved over the doors of the building housing the Internal Revenue Service in the nation’s capital.<sup>9</sup> During the process of emblazoning those words upon that building, for a time the words were “taxes are what we pay.” Had only those words remained, we would likely be having quite a different conversation here today. But as completed, Mr. Justice Holmes did not say *tax* is the price that we pay. Nor did he say that taxes are paid only by a few. “*Taxes*”—the word is plural. And *we* pay. So let’s think more deeply about this quote. Just who is “*we*”; what are these *taxes*; and what does this *civilized society* look like?

## III. “SKIN IN THE GAME”

Let me digress for just a moment. How many of you have heard or used the phrase “skin in the game?” To my surprise, while watching the Golden Globe awards on January 12th (for all of ten minutes), I heard Matthew McConaughey use the phrase in his acceptance speech upon re-

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7. See Letter from SCLC, to the President, Congress, and Supreme Court of the United States (Feb. 6, 1968), *available at* <http://www.thekingcenter.org/archive/document/economic-and-social-bill-rights>. Dr. King had earlier shared this vision on the world stage during his 1964 Nobel Prize acceptance speech. See Martin Luther King, Jr., Nobel Prize Acceptance Speech (Dec. 10, 1964), *available at* [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1964/king-acceptance\\_en.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1964/king-acceptance_en.html) (“I have the audacity to believe that peoples everywhere can have three meals a day for their bodies, education and culture for their minds, and dignity, equality and freedom for their spirits.”).

8. *Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

9. See Jay Netherton, A “Higher” Calling for the IRS?, *WETHEPEOPLE.ORG* (June 19, 2013), <http://wethepeoplehq.org/2013/06/19/a-higher-calling-for-the-irs/>.

ceiving the award for his starring role in *Dallas Buyers Club*.<sup>10</sup> McConaughey said, "This film . . . was an underdog . . . turned down 86 times. . . . We got the right people together five years ago, stuck to it, put some *skin in the game*, and here it is."<sup>11</sup> I assume that as used here, he was referring to investing capital in the project, deemed to be an important signal to possible investors. The message to potential investors: We have put our money on the line . . . we are committed to this project . . . you should be too.

"Skin in the game"—I was instantly more attentive. Not because of his receipt of the award (well deserved in my view), but because of his use of the phrase. In non-political settings, it has been the currency demanded of those seeking to influence an outcome in a variety of circumstances including business, finance, betting, and war: "Skin in the game"—some *thing* that the interested party has at risk. Though he denies it, Warren Buffett was thought to have coined the phrase in the business world.<sup>12</sup> No doubt he, like many others, has demanded that ante when it appeared strategically useful to do so. Indeed, William Safire, writing in 2006, cited a 1912 news report in which the phrase was used and suggested that the concept of, at the very least a *skin game*, predated that 1912 report by almost 100 years!<sup>13</sup>

I had encountered that phrase on a recurring basis in recent political discourse. The phrase with its unmistakable message has become a part of everyday American politics. It may have first been introduced into political jargon by Senator Tom Coburn (R-OK) in 2006 as the United States Senate considered health savings accounts (H.S.A.). During the Senate debate on a bill that its sponsors claimed would reduce health insurance premiums, Senator Coburn argued that "H.S.A.'s [would] give consumers some '*skin in the game*' by putting them in charge of health-care dollars."<sup>14</sup> The phrase has been used in both the executive and legislative branches of government and across party lines. It has been deployed by then President-elect Barack Obama,<sup>15</sup> Representative David Camp (R-MI),<sup>16</sup> and

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10. Mr. McConaughey has since received the 2014 Oscar award for the Best Performance by an Actor in a Leading Role for *Dallas Buyers Club*.

11. *71st Golden Globe Awards* (NBC television broadcast Jan. 12, 2014) (emphasis added).

12. See William Safire, *Skin in the Game*, N.Y. TIMES (Sept. 17, 2006), [http://www.nytimes.com/2006/09/17/magazine/17wwln\\_safire.html](http://www.nytimes.com/2006/09/17/magazine/17wwln_safire.html).

13. See *id.*

14. *Id.* (quoting Sen. Tom Coburn).

15. See Jennifer Parker, *Obama Calls for 'Grand Bargain' on Economy: 'Everybody's Going to Have to Give'*, ABC NEWS (Jan. 10, 2009, 2:25 PM), <http://abcnews.go.com/blogs/politics/2009/01/obama-calls-for-2/> (noting that President-elect Obama explained that long-term fix for economy would demand sacrifices from all Americans, "Everybody's going to have to give. Everybody's going to have some skin in the game").

16. See George F. Will, *Dave Camp's Plan: Taxes Made Simple*, WASH. POST (Dec. 23, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122203771.html> ("I believe . . . you've got to have some responsibility

Senator Mark Warner (D-VA).<sup>17</sup> In short, it seems that “skin in the game” is becoming the price for participation in the political process. Personal financial risk—some *personal* stake—is demanded of all “players.” The implications are clear: no skin, no play. If you want to participate in the conversation, you must bring something to the table.

That these are very high stakes indeed should go without saying. Broad participation in political debate has long been the aspiration for American governance. Limiting political participation on the basis of economic participation would certainly undermine that goal and would also arguably compromise the concept of what it means to be a citizen. A required economic ante (or the absence thereof), with its vast potential for constitutional mischief, should not be the litmus test for political participation. In fact, this tactic has actually been previously deployed. The poll taxes of the late nineteenth and early twentieth centuries, primarily instituted as part of the Jim Crow laws,<sup>18</sup> imposed a tax as a precondition to exercising the right to vote—precisely the kind of economic ante that “skin in the game” implicitly requires. Poll taxes were finally deemed unconstitutional in *Harper v. Virginia State Board of Elections*<sup>19</sup> in 1966. Any conceptual descendants having a similar effect should meet the same constitutional fate.

Furthermore, the suggestion that a significant percentage of Americans do *not* have “skin in the game” is specious. The fact of the matter is that most Americans—indeed, the vast majority of Americans—*do* have “skin in the game.”

The requirement for “skin in the game,” in the context of the recent deficit debate,<sup>20</sup> along with the “concern” so widely discussed in the 2012 campaign—that almost 50% of Americans pay no federal income tax<sup>21</sup>—is

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for the government you have.’ People have co-payments under Medicare, and everyone should have some ‘skin in the game’ under the income tax system.”).

17. See Naftali Bendavid & Damian Paletta, *Senate ‘Gang’ Hashes out Deficit Plan*, WALL ST. J. (May 2, 2011, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748704569404576297221814287188> (“[T]here’s no option but to push ahead. A way forward won’t be found ‘unless there’s a grand enough bargain that everybody feels they’ve got some skin [in] the game’ . . .”).

18. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 84 (2001) (noting that poll tax was “esteemed . . . as the most reliable means of curtailing the franchise . . .”).

19. 383 U.S. 663 (1966).

20. See, e.g., Travis Waldron, *Taxing the Poor: The Only Tax Increase Republicans Support*, THINKPROGRESS (July 25, 2011, 2:20 PM), <http://thinkprogress.org/economy/2011/07/25/278175/taxing-the-poor-republicans-support/> (providing quotes from Sen. Orrin Hatch, Sen. John Cornyn, Sen. Dan Coats, and Rep. Eric Cantor that working poor need to contribute more to tax revenues).

21. The surreptitiously recorded comment made by then presidential candidate Mitt Romney during a 2012 private reception for wealthy donors remains illustrative. Romney was recorded as he described almost half of Americans as “people who pay no income tax,” are “dependent upon government,” and “believe the government has a responsibility to care for them.” Michael D. Shear & Michael Barbaro, *In Video Clip, Romney Calls 47% ‘Dependent’ and Feeling Entitled*,

but the latest version of the ongoing political “cut-taxes/reduce governmental size” wrangling. Paul Krugman noted in a *New York Times* op-ed that the downsizing argument has at its heart an “effort to . . . bully the nation into slashing social programs—especially programs that help the poor.”<sup>22</sup> The deficit debate is yet another play on the high political visibility of the *federal income tax* as an institution. Though a year apart, the deficit and 47% comments share a common thread: all are driven by the view that those Americans who are *federal income tax* “freeloaders” are not entitled to a political voice. Rather, these Americans can be shut out of the conversation regarding governmental imperatives. Both sets of comments, however, share a fatal flaw: neither look beyond the federal level—and the federal income tax at that—in assessing the extent to which Americans across the income spectrum bear the burden of costs of governance *writ large*.

An editorial published in the *New York Times* in the summer of 2011 addressed this myopia.<sup>23</sup> The editorial conceded, as it must, that in the context of that debate, the group from whom skin was demanded was the 47% of Americans who did not pay federal income tax.<sup>24</sup> Of critical importance, however, as the *New York Times* editorial also pointed out, the absence of liability on the lower end of the socio-economic scale results from deliberate tax policy.<sup>25</sup> A combination of deductions, exemptions, and credits—along with the progressive structure of the internal revenue code—ensures that the poorest Americans are shielded entirely from income tax liability.<sup>26</sup> Many (though not all) of those earning more than this minimal amount are advantaged by tax expenditures designed to accord tax relief to Americans hardest pressed economically. An important element of this deliberate policy has been the Earned Income Tax Credit (EITC), implemented with bipartisan support during the Nixon administration and substantially reformed during the Reagan administration.<sup>27</sup>

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N.Y. TIMES (Sept. 17, 2012, 6:51 PM), [http://thecaucus.blogs.nytimes.com/2012/09/17/romney-faults-those-dependent-on-government/?\\_php=true&\\_type=blogs&\\_r=0](http://thecaucus.blogs.nytimes.com/2012/09/17/romney-faults-those-dependent-on-government/?_php=true&_type=blogs&_r=0).

22. Paul Krugman, Op-Ed., *The Populist Imperative*, N.Y. TIMES (Jan. 23, 2014), <http://www.nytimes.com/2014/01/24/opinion/krugman-the-populist-imperative.html>.

23. See Editorial, *The New Resentment of the Poor*, N.Y. TIMES (Aug. 30, 2011), <http://www.nytimes.com/2011/08/31/opinion/the-new-resentment-of-the-poor.html>.

24. *Id.*

25. See *id.* The editorial defines the poor as those families making less than \$40,000 annually, noting that nearly ninety percent of those families paying no income tax make less than this figure. *Id.* The average income for an American household is, presently, approximately \$50,000 annually.

26. See *id.* Taxpayers will not be subject to liability until taxable income exceeds an amount greater than the combination of the standard deduction and the appropriate number of personal exemptions.

27. See Thomas L. Hungerford & Rebecca Thiess, *The Earned Income Tax Credit and the Child Tax Credit: History, Purpose, Goals, and Effectiveness*, ECON. POLICY INST.

The editorial also correctly notes that the federal income tax is not the only source of governmental tax liability.<sup>28</sup> Exemption of liability for federal income tax purposes does not necessarily carry with it similar exemption from other levies either on the federal level or on the state and local levels.<sup>29</sup> In the words of the editorial, “[e]ven if [Americans] earn too little to qualify for the [federal] income tax, they pay payroll taxes . . . gasoline excise taxes and state and local taxes.”<sup>30</sup>

The editorial’s key point bears repeating: Americans who do not pay federal income taxes pay *state and local taxes in addition to* any levies to which they remain subject on the federal level. A close examination of the effect of this cumulative liability makes even more powerful the editorial’s assertion that “a vast majority of Americans have skin in the tax game.”<sup>31</sup>

The simple fact is that the American system of governance is not unitary but deliberately federalist. Further, *fiscal* federalism is inextricably a feature of this stratified American governance. As such, government on *each* level must identify sources of revenue adequate to defray services provided and—with the exception of the federal government—must do so within the confines of a balanced budget.<sup>32</sup>

In reality, the state and local taxes upon which subnational governments rely inevitably impose an additional economic burden on less affluent taxpayers. Because of either the inherently regressive nature of many of the levies upon which subnational governments rely or the manner in which they have been implemented (and sometimes both), less affluent Americans may well carry *more* than their “fair share” of the aggregate tax burden. That is, they pay more than they may reasonably be expected to pay in light of their more limited disposable income. Further, the taxes paid may have little political salience, thus gaining little traction for affected taxpayers. In short, these taxpayers may have little or no political visibility. Finally, because of the long-term economic effects of decades of racial discrimination, marked racially demarcated differences in wealth exist. Black and brown Americans are demonstrably less affluent (and have

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(Sept. 25, 2013), <http://www.epi.org/publication/ib370-earned-income-tax-credit-and-the-child-tax-credit-history-purpose-goals-and-effectiveness/>.

28. See Editorial, *supra* note 23.

29. For an explanation of the impact this can have on taxes paid, see CONG. BUDGET OFFICE, THE DISTRIBUTION OF HOUSEHOLD INCOME AND FEDERAL TAXES, 2008 AND 2009 14 (2012), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43373-06-11-HouseholdIncomeandFedTaxes.pdf> (“For most income groups, the 2009 average federal tax rate was the lowest observed in the 1979–2009 period . . . . Payroll tax rates rose steadily for the lowest income group, offsetting some of the decline in their individual income tax rates.”).

30. Editorial, *supra* note 23.

31. *Id.*

32. See generally NAT’L CONFERENCE OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS (October 2010), available at <http://www.ncsl.org/research/fiscal-policy/state-balanced-budget-requirements-provisions-and.aspx> (discussing various state balanced budget requirements).

less disposable income) than their white counterparts.<sup>33</sup> As a result, the burden of regressive taxes is quite likely borne disproportionately by Americans of color.

#### IV. REVENUE SOURCES: AN OVERVIEW

A cursory review of the kinds of levies to which taxpayers are likely to be subject on each level of government is helpful here. Recall that government on *each* level must identify sources of revenue adequate to defray services provided. Without exception, on each level, in recent years and as a matter of fiscal necessity, income items for such budgets have been of mixed source; that is, both major and minor sources of revenue have been tapped.<sup>34</sup> Relatively speaking, income, retail sales, federal government transfers, and property taxes are major sources of revenue and “everything else”—including user charges, license fees, and excise taxes—are minor but increasingly important sources of revenue.<sup>35</sup>

##### A. *The Federal Government*

On the federal level, the individual income tax has been the major income source and currently accounts for approximately 46% of federal revenue.<sup>36</sup> As has been widely reported, this burden is not borne by all Americans; approximately 47% of American taxpayers paid no federal income tax at all in 2011.<sup>37</sup> A point lost in the heated rhetoric of the deficit debates and the 2012 presidential campaigns is that the percentage had not always been that high. The 2011 percentage reached what was then a historic high as a result of the great recession of 2008; the historical average is about 40%.<sup>38</sup> More recently, in 2013, approximately 43% of Ameri-

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33. See U.S. CENSUS BUREAU, TABLE 695. MONEY INCOME OF FAMILIES—NUMBER AND DISTRIBUTION BY RACE AND HISPANIC ORIGIN: 2009, [http://www.census.gov/compendia/statab/cats/income\\_expenditures\\_poverty\\_wealth.html](http://www.census.gov/compendia/statab/cats/income_expenditures_poverty_wealth.html) (providing data on family incomes grouped by race and national origin).

34. See CHERYL H. LEE ET AL., U.S. CENSUS BUREAU, STATE GOVERNMENT FINANCES SUMMARY REPORT 2–4 (Jan. 23, 2013), available at <http://www2.census.gov/govs/state/12statesummaryreport.pdf> (discussing various sources of state revenues).

35. See TAX POLICY CTR., *State and Local Tax Policy: How Have the Sources of Revenue for State and Local Governments Changed over Time*, fig. 1 (May 8, 2013), <http://www.taxpolicycenter.org/briefing-book/state-local/revenues/overtime.cfm>.

36. WHITE HOUSE OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES, TBL. 2.1, available at <http://www.whitehouse.gov/omb/budget/historicals>.

37. See Editorial, *supra* note 23; see also Chuck Marr & Chye-Ching Huang, *Misconceptions and Realities About Who Pays Taxes*, CTR. ON BUDGET & POLICY PRIORITIES (Sept. 17, 2012), <http://www.cbpp.org/cms/?fa=view&id=3505>.

38. See Marr & Huang, *supra* note 37.



can taxpayers had no liability.<sup>39</sup> New estimates project a continually declining percentage until, by 2024, only about one-third will pay no tax.<sup>40</sup>

It remains significant that a sizeable minority of Americans will continue to have no federal income tax liability. This assumption rests on the expectation that the present deliberate tax policy will remain in place. Given that assumption, as is presently the case, quite likely a substantial percentage of this exempt group will remain the working poor.<sup>41</sup> For these Americans, the combination of the standard deduction and the personal exemption will lop off the bottom of the income curve.<sup>42</sup> Further, many of the taxpayers who exceed those minimal incomes but remain at quite low income levels will continue to receive disbursements as appropriate from the federal treasury through the Earned Income Tax Credit (EITC), making the system a negative income tax to this extent.<sup>43</sup> Importantly, despite its shortcomings, many economists and policy makers regard the EITC as having been highly effective in lifting substantial numbers of the American working poor out of poverty.<sup>44</sup> Additional relief for earners on the lower end of the income spectrum is provided through the Child and Dependent Care Credit and the Child Tax Credit (CTC), which in combination, effectively exempt an additional segment from liability.<sup>45</sup> When these numbers—those advantaged by the EITC and those advantaged by the Childcare Credits—are increased by the number of

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39. See Robertson Williams, *And Now for the Movie: Fewer Americans Pay No Federal Income Tax*, TAX POLICY CTR. (Aug. 29, 2013, 11:51 AM), <http://taxvox.taxpolicycenter.org/2013/08/29/and-now-for-the-movie>.

40. *Id.* This projection is predicated upon the expectation that the economy will continue to improve and, possibly, the expiration of tax cuts.

41. See Marr & Huang, *supra* note 37 (“Most of the people who pay neither federal income tax nor payroll taxes are low-income people who are elderly, unable to work due to a serious disability, or students . . .”).

42. See IRS, Publication 501 (2013), *available at* [http://www.irs.gov/publications/p501/ar02.html#en\\_US\\_2013\\_publink1000289305](http://www.irs.gov/publications/p501/ar02.html#en_US_2013_publink1000289305) (showing that standard deduction is \$12,200 for married couple filing jointly and personal exemption is \$3,900, for total non-taxable amount of \$20,000 for married couple filing jointly).

43. See CTR. ON BUDGET & POLICY PRIORITIES, *Policy Basics: The Earned Income Tax Credit* (Jan. 31, 2014), <http://www.cbpp.org/cms/?fa=view&id=2505>. The EITC subsidizes low-income working families. It provides a refundable credit equal to a fixed percentage of earning from the first dollar of earning until the credit reaches its maximum. After that point, it is phased out until it disappears entirely. See I.R.C. § 32 (2012).

44. See CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 43. The Center on Budget and Policy Priorities, using Census Bureau data, estimates that in 2012, the credit “lifted about 6.5 million people out of poverty, including about 3.3 million children.” *Id.*

45. See IRS, *Ten Things to Know About the Child and Dependent Care Credit* (March 7, 2011), <http://www.irs.gov/uac/Ten-Things-to-Know-About-the-Child-and-Dependent-Care-Credit> (illustrating tax relief and requirements for Child and Dependent Care Credit); see also I.R.C. § 21 (providing tax credit for expenses for household and dependent care services necessary for gainful employment); I.R.C. § 24 (providing for child tax credit). The CTC is the largest tax code provision benefiting families with children.

(most likely elderly) taxpayers, who are in receipt of modest pensions and Social Security benefits,<sup>46</sup> a substantial minority exists. Finally and inevitably, some segment of potential taxpayers may have no liability in spite of substantially higher incomes because of the confluence of other tax preferences or because of strategic tax planning. Included in this final category are taxpayers who are advantaged by deductions for mortgage interest, state and local taxes, charitable contributions, and exclusion for contributions to pensions, 401(k) plans, and employer-sponsored health insurance.

In any case, all of those who fall into this group will remain subject to other federal taxes and levies. Payroll taxes constitute the next major source of revenue, generating approximately 35% of federal revenues.<sup>47</sup> This category includes social security and Medicare taxes as well as unemployment insurance and federal workers' pension contributions.<sup>48</sup> In 2011, a *New York Times* editorial noted that “[o]nly 14 percent of households pay neither income nor payroll taxes . . . .”<sup>49</sup> This remains the case.<sup>50</sup> Bringing up the rear insofar as individual taxpayers are concerned are excise or transactional taxes—proceeds of which comprise approximately 3% of federal revenues.<sup>51</sup> Included here are levies on alcohol, tobacco, telephone, ozone-depleting chemicals/products, and transportation fuels.<sup>52</sup>

### B. State Governments

States' major income items have been either the retail sales tax,<sup>53</sup> or individual income tax,<sup>54</sup> or some combination thereof for a significant share—about two-thirds—of revenue generated.<sup>55</sup> Both of these systems

46. See IRS, *Topic 410—Pensions and Annuities* (Feb. 27, 2014), <http://www.irs.gov/taxtopics/tc410.html>.

47. See CTR. ON BUDGET & POLICY PRIORITIES, *Policy Basics: Where Do Federal Tax Revenues Come From?* (Mar. 31, 2014), <http://www.cbpp.org/cms/?fa=view&id=3822>.

48. See IRS, *Understanding Employment Taxes*, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Understanding-Employment-Taxes> (last updated June 13, 2014) (providing information on employment taxes).

49. Editorial, *supra* note 23.

50. See Williams, *supra* note 39.

51. See CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 47.

52. See *id.*

53. See *State Sales Taxes*, FED'N OF TAX ADM'RS (Jan. 1, 2014), [http://www.taxadmin.org/fta/rate/tax\\_stru.html](http://www.taxadmin.org/fta/rate/tax_stru.html) (providing data on retail sales tax and states' income).

54. See *State Income Taxes*, FED'N OF TAX ADM'RS (Jan. 1, 2014), [http://www.taxadmin.org/fta/rate/tax\\_stru.html](http://www.taxadmin.org/fta/rate/tax_stru.html) [hereinafter *State Income Taxes*] (providing data relating to individual income tax and states' income).

55. See SHEILA O'SULLIVAN ET AL., U.S. CENSUS BUREAU, *STATE GOVERNMENT TAX COLLECTIONS SUMMARY REPORT: 2012 2* (Apr. 11 2013), available at <http://www2.census.gov/govs/statetax/2012stcreport.pdf> (noting that general sales and individual income taxes generated 30.5% and 35.3% of state income respectively, for total of 65.8% of revenue).

have been subject to intensive review and fiscal tweaking recently as states have struggled in the wake of the latest economic downturn to accommodate falling revenues, sometimes in the face of increasing demand for services.<sup>56</sup> Retail sales taxes have been particularly volatile as state legislative bodies seek continuously to offset budget deficits by increasing collections through this mechanism.<sup>57</sup>

### C. Local Governments

Local governments<sup>58</sup> have since the 1930s relied principally upon the *ad valorem* property tax for financial support.<sup>59</sup> The property tax is, in its purest form, levied against all real property, residential and business, within the geographic confines of the taxing district. This tax has almost from its inception been unpopular with taxpayers and commentators alike.<sup>60</sup> Its most salient feature is the factor that likely has contributed most to its lack of popularity; again, in its purest form, it is an annual tax on wealth as measured by the value of property imposed without regard to taxpayer liquidity.

### D. General Observations

In addition, on both the state and local levels, a variety of transaction-based targeted taxes, fees, and user charges are in place.<sup>61</sup> This hodgepodge of additional revenue sources has steadily become more diverse and of greater fiscal importance over the last several decades. Prominently included in this last group of levies are the so-called sin taxes: taxes on alcohol, tobacco, and gaming.<sup>62</sup>

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56. See, e.g., Phil Oliff et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET & POLICY PRIORITIES (June 27, 2012), <http://www.cbpp.org/cms/?fa=view&id=711>.

57. See Gary C. Cornia & Ray D. Nelson, *State Tax Revenue Growth and Volatility*, 6 REG'L ECON. DEV. 23, 32 (2010), available at <https://research.stlouisfed.org/publications/red/2010/01/Cornia.pdf> (discussing volatility with regard to retail sales tax).

58. Included here are county commissions, city councils, town councils, school districts, and special government districts having financial independence.

59. See WERNER Z. HIRSCH, *THE ECONOMICS OF STATE AND LOCAL GOVERNMENT* 96 (Seymour E. Hartis ed., 1970); JAMES A. MAXWELL & J. RICHARD ARONSON, *FINANCING STATE AND LOCAL GOVERNMENTS* 135–37 (3d ed. 1977).

60. For example, in 1994, 28% of Americans chose the local property tax as the worst tax, over the federal income tax, social security tax, state income tax, and state sales tax. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *CHANGING PUBLIC ATTITUDES ON GOVERNMENTS AND TAXES I* (1994), available at <http://www.library.unt.edu/gpo/ACIR/Reports/survey/S-23.pdf> (highlighting survey in which 28% of Americans chose local property tax as worst tax); see also HIRSCH, *supra* note 59, at 95.

61. See LEE ET AL., *supra* note 34.

62. The legalization of marijuana may present the next big opportunity for significant increases in sin tax collections. Legalization is being viewed by officials in Colorado as a potential tax bonanza. Colorado's most recent budget proposal estimated that sales of marijuana for recreational use could reach \$610 billion in the next fiscal year. The proposal projected sales tax collections of \$134 million

Importantly, with the exception of *potentially* progressive taxes on individual incomes (and in a few states on estates and gifts),<sup>63</sup> on all levels the additional sources of revenue described—major and minor—are generated through the use of flat-rates. Whether imposed annually (e.g., federal payroll taxes)<sup>64</sup> or transactionally (e.g., retail sales taxes), structurally, the levy is a single fixed rate imposed on a targeted transaction. As such, because the same flat rate is imposed over, and over, and over again, regressive effect is unavoidable. The federal income tax, on the other hand, is an annually determined progressive tax.<sup>65</sup> Those taxpayers who have more pay more and, consequently, bear a larger share of the costs of government. A caveat here: state income tax systems may or may not be progressive. Progressivity may mirror that of the federal system or may be muted primarily by virtue of a relatively tight state marginal rate structure.<sup>66</sup> State income tax systems may, in fact, be regressive in effect if the state relies upon a flat rate to determine liability.

#### V. WHY CARE ABOUT REGRESSIVE EFFECT? ORIGIN AND MANAGEMENT

A quick example demonstrates regressive effect. Again and briefly, to characterize a tax or system of charges as regressive is to say that the levy exacts more, relatively speaking, from those having *less* from which to pay it. Assume that we have two individual taxpayers. Taxpayers *A* and *B* are both domiciled in the State of Bliss. Both are required to pay 10% of incomes received during the calendar year to the State of Bliss. Taxpayer *A* has \$10,000 in income from which to pay the tax and Taxpayer *B* has \$45,000. Taxpayer *A*'s tax bill of \$1,000 imposes a much greater real cost

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from such transactions. See Jack Healy, *Colorado Expects to Reap Tax Bonanza from Legal Marijuana Sales*, N.Y. TIMES (Feb. 20, 2014), <http://www.nytimes.com/2014/02/21/us/colorado-expects-to-reap-tax-bonanza-from-legal-marijuana-sales.html> (explaining potential tax effects of legalization of marijuana). Whether that outcome will be realized is, of course, unknowable. As noted in a recent Washington Post editorial, “[o]ver time, the tax take from legal pot probably won’t live up to the hype because producers, distributors and consumers could develop into a powerful lobby opposed to taxation.” Editorial, *Tax Revenue from Legalized Marijuana May Not Meet Expectations*, WASH. POST (Mar. 5, 2014), [http://www.washingtonpost.com/opinions/tax-revenue-from-legalized-marijuana-may-not-meet-expectations/2014/03/05/4b14865e-a2f7-11e3-a5fa-55f0c77bf39c\\_story.html](http://www.washingtonpost.com/opinions/tax-revenue-from-legalized-marijuana-may-not-meet-expectations/2014/03/05/4b14865e-a2f7-11e3-a5fa-55f0c77bf39c_story.html).

63. See *State Income Taxes*, *supra* note 54.

64. Federal payroll taxes are flat-rate taxes that apply without exemption on salaries up to (most recently) \$106,800. As a result, these taxes have a very regressive effect.

65. See IRS, *2013 Form 1040 Tax Table & 2013 Form 1040 Tax Computation Worksheet* (2013), available at <http://www.irs.gov/pub/irs-pdf/i1040tt.pdf> (demonstrating that federal income tax is annually determined progressive tax).

66. See *State Individual Income Tax Rates*, FED’N OF TAX ADM’RS (Jan. 1, 2014), [http://www.taxadmin.org/fta/rate/ind\\_inc.pdf](http://www.taxadmin.org/fta/rate/ind_inc.pdf) [hereinafter *State Income Tax Rates*] (showing that Colorado, Illinois, Indiana, Massachusetts, Michigan, North Carolina, Pennsylvania, and Utah all have single tax bracket, while, Hawaii, for example, has twelve brackets ranging from 1.4%–11%).

to *A* than will be true for Taxpayer *B*, whose \$4,500 liability is higher but who also has more disposable resources from which to pay the levy.

Regressive effect is not intentional. Rather, it inevitably results from the use of any flat rate levy. As a policy matter, whether and how regression *should or could* be managed is a separate and important question. The extent to which mitigation can be realized will be driven by several factors. These include (1) the level of government whose fiscal structure is under the microscope; (2) its fiscal challenges; (3) the nature of the levy in question in conjunction with other revenue sources; and, inevitably, (4) political dynamics. Regression in retail sales taxes, for example, is typically eased by providing exemptions for designated transactions.<sup>67</sup> For example, exemptions for the cost of foods purchased for preparation and consumption at home are in place in thirty-one of the forty-five states that have a retail sales tax. Of the remaining states, seven tax groceries at lower rates than other goods, five tax groceries fully but offer credits offsetting some portion of the cost, and two apply sales tax fully without relief.<sup>68</sup> One should not necessarily take tax solace from this well-intentioned relief provision, however. As will be shown, relief from regressive effect may prove illusory because of the happenstance of personal circumstance.

Broadly speaking, political considerations will inevitably come into play as legislative bodies address fiscal issues including the mix of revenue-generating systems. Consider this hypothetical. State *A* needs to raise additional revenue in order to maintain its spending *status quo*. This is not a matter of providing additional services. The legislature has three options: (1) increase income taxes by raising marginal rates—coincidentally realizing a progressive effect; (2) increase sales taxes by raising the applicable rate—exacerbating regressivity; or (3) increase the state cigarette tax—also regressive in effect. We will assume, reasonably, that all of the legislators have the best interests of State *A* in mind but of course included in that calculus is the importance of retaining their seats!<sup>69</sup> Practically, credible data establish that any of the three possibilities can generate the needed revenues, but voters—through emails, tweets, and facebook postings—have in no uncertain terms urged the decision-makers to refrain from manipulating either income or sales tax rates. Reasons pressed upon lawmakers by these involved taxpayers are those that you can imagine and may well have heard: among others, higher income tax rates will cause

67. See generally ANDREEA MILITARU & THOMAS STRATMANN, MERCATUS CTR., A SURVEY OF SALES TAX EXEMPTIONS IN THE STATES: UNDERSTANDING SALES TAXES AND SALES TAX EXEMPTIONS (Jan. 7, 2014), available at <http://mercatus.org/publication/survey-sales-tax-exemptions-states-understanding-sales-taxes-and-sales-tax-exemptions>.

68. See *State Sales Tax Rates and Food & Drug Exemptions*, FED'N OF TAX ADM'RS (Jan. 1, 2014), <http://www.taxadmin.org/fta/rate/sales.pdf> [hereinafter *State Sales Tax Rates*] (showing differences in food and drug exemptions among states).

69. See generally WILLIAM J. KEEFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES (10th ed. 2000).

affluent voters to exit the state<sup>70</sup> and increased sales taxes will place retailers at a competitive disadvantage.<sup>71</sup> Ah, but an increase in cigarette taxes—*who cares?* Political action groups composed of smokers or others interested in resisting an increase in a cigarette tax are rare and, in any event, may be relatively dispassionate in light of an agenda unrelated to the tax burden *per se*. How much credence, after all, is the tobacco industry now likely to enjoy as a proponent of lower taxes?<sup>72</sup> And when last have you seen a bumper sticker declaring that “I am a smoker and I vote!”? An increase in a tax on sin often seems the path of least political resistance, hence the proliferation of this category of levies in particular.<sup>73</sup> As a practical matter, many—non-smokers—never expect to be affected by the levy, and those who will pay are unlikely to seek political sympathy. Coincidentally, there is one interest group that would strongly *support* an increased cigarette tax, but not for reasons of revenue enhancement. Here we would find anti-smoker coalitions that would, quite rightly, anticipate reduced cigarette usage as an ultimate consequence of higher tax cost.<sup>74</sup> Cigarette tax revenues are price sensitive and have, in fact, declined over time after a period of enhanced collections.<sup>75</sup>

To give this discussion more immediacy, let’s stop for a moment and examine the Pennsylvania tax structure. You have a tax on individual incomes that uses a *flat rate*, 3.07%, on incomes.<sup>76</sup> By the way, Pennsylvania’s reliance on a flat rate makes it one of only eight states utilizing a flat rate among the forty-five states that tax income.<sup>77</sup> (Interestingly, one of the other seven states is Massachusetts; both of these states are adjacent to New York.<sup>78</sup> There is likely an intriguing story of tax competition be-

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70. *But see* Robert Smith, *Studies: Rich Don’t Flee High-Tax States*, NPR (Apr. 29, 2011, 12:01 AM), <http://www.npr.org/blogs/money/2011/04/29/135813061/studies-rich-dont-flee-high-tax-states>.

71. *See* Jeff Bell, *Tired of Disadvantage, Retailers Stump for Online Sales Tax*, CINCINNATI BUS. COURIER (Oct. 28, 2011, 6:00 AM), <http://www.bizjournals.com/cincinnati/print-edition/2011/10/28/tired-of-disadvantage-retailers-stump.html?page=all>.

72. *See* Michael S. Givel & Stanton A. Glantz, *Tobacco Lobby Political Influence on US State Legislatures in the 1990s*, 10 TOBACCO CONTROL 124 (2001), *available at* <http://tobaccocontrol.bmj.com/content/10/2/124.full>.

73. *See* Katrina Trinko, Opinion, *Political Cowards Love the Sin Tax*, USA TODAY (Sept. 20, 2010, 5:13 PM), [http://usatoday30.usatoday.com/news/opinion/forum/2010-09-21-column21\\_ST\\_N.htm?loc=interstitialskip](http://usatoday30.usatoday.com/news/opinion/forum/2010-09-21-column21_ST_N.htm?loc=interstitialskip).

74. *See generally* Frank J. Chaloupka et al., *Tobacco Taxes as a Tobacco Control Strategy*, 21 TOBACCO CONTROL 172 (2012), *available at* <http://tobaccocontrol.bmj.com/content/21/2/172.full.pdf+html> (demonstrating that over 100 studies have found that tobacco excise taxes are powerful tool for reducing tobacco use).

75. *Id.*

76. *See State Income Tax Rates*, *supra* note 66.

77. *See id.*

78. *See id.*

tween states here). Your sales tax rate is 6%<sup>79</sup>—sixteenth highest in the country—with exemptions for “not-ready-to-eat” food,<sup>80</sup> most wearing apparel, legally available drugs both prescribed and over-the-counter,<sup>81</sup> and some textbooks.<sup>82</sup> The sales tax rate is 8% in Philadelphia and 7% in Allegheny County (Pittsburgh).<sup>83</sup> Cigarettes are taxed at the rate of \$1.60/pack—twenty-second highest in the country.<sup>84</sup> Your tax on gasoline has just been increased by \$.095/gallon for 2014,<sup>85</sup> setting you on course to have the highest such tax in the country by 2017.<sup>86</sup> Finally, I found particularly interesting the fact that Pennsylvania generates over \$1.4 billion annually from gambling revenues,<sup>87</sup> more money from casino gambling than any other state.<sup>88</sup> In 2013, over half that amount, \$782.5 million, will be used for property tax relief on the local level.<sup>89</sup> The property tax is the principal source of revenue on the local level (excluding inter-governmental transfers)<sup>90</sup> and is only levied on those who can afford to own property.<sup>91</sup> Thus, Pennsylvania uses levies on gambling revenues, costs borne overwhelmingly by the poor,<sup>92</sup> to alleviate property tax levies—relief that benefits only the class of individuals who own property. Overall, this is a pretty regressive structure.

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79. 61 PA. CODE § 31.2 (1972). For the proposition that the 6% rate is the sixteenth highest in the nation, see *State Sales Tax Rates*, *supra* note 68.

80. 61 PA. CODE § 60.7(b)(5) (1994); *see also State Sales Tax Rates*, *supra* note 68.

81. 61 PA. CODE § 52.1(b) (1990).

82. *Id.* § 58.9 (1971).

83. *See* PA. DEP'T OF REVENUE, *Sales, Use and Hotel Occupancy Tax*, [http://www.portal.state.pa.us/portal/server.pt/community/sales\\_use\\_hotel\\_occupancy\\_tax/14487](http://www.portal.state.pa.us/portal/server.pt/community/sales_use_hotel_occupancy_tax/14487) (last visited Aug. 1, 2014).

84. *See State Excise Tax Rates on Cigarettes*, FED'N OF TAX ADM'RS (Jan. 1, 2014), <http://www.taxadmin.org/fta/rate/cigarette.pdf>.

85. *See* 43 Pa. Bull. 7360 (Dec. 14, 2013).

86. *See* Peter Mucha, *Pa. Gas Tax to Rise Jan. 1, Again in 2015 and '17*, PHILA. INQUIRER (Dec. 31, 2013, 12:28 PM), [http://www.philly.com/philly/news/Pa\\_gas\\_tax\\_to\\_rise\\_Jan\\_1\\_again\\_in\\_2015\\_and\\_17.html](http://www.philly.com/philly/news/Pa_gas_tax_to_rise_Jan_1_again_in_2015_and_17.html) (explaining that by 2017, new tax rate could add up to 25 cents to each gallon, making Pennsylvania's gas tax rate higher than any current gas tax rate in country).

87. Harold Brubaker, *Pa. Leads in Casino Tax Revenue*, PHILA. INQUIRER (Aug. 26, 2013), [http://articles.philly.com/2013-08-26/business/41446163\\_1\\_casino-tax-revenue-casino-advocate-gambling](http://articles.philly.com/2013-08-26/business/41446163_1_casino-tax-revenue-casino-advocate-gambling).

88. *Id.*

89. *Id.*

90. *See* Robertson Williams & Yuri Shadunsky, *State and Local Tax Policy: What Are the Sources of Revenue for Local Governments?*, TAX POLICY CTR. (May 7, 2013), [http://www.taxpolicycenter.org/briefing-book/state-local/revenues/local\\_revenue.cfm](http://www.taxpolicycenter.org/briefing-book/state-local/revenues/local_revenue.cfm) (illustrating sources of local revenue).

91. The property tax, however, is not in itself progressive; it is technically regressive for those upon whom it is levied.

92. *See generally* Mary O. Borg et al., *The Incidence of Taxes on Casino Gambling: Exploiting the Tired and Poor*, 50 AM. J. ECON. & SOCIOLOGY 323 (1991) (discussing impact of casino taxes on poor).

I submit that regressive effect *should* be a policy concern. Regression imposes a greater financial burden on those with fewer resources from which to service the levy. This nagging question persists: should public budgets, in the final analysis, be balanced on the backs of those least able to pay?<sup>93</sup>

So where are we now in this analysis? Recall point one: Americans who do not pay federal income tax nonetheless have “skin in the game;” they are subject to other federal taxes and levies as well as a wide range of tax and non-tax levies on the state and local level. Here I reiterate point two: In light of the regressive effect of, especially state taxing structures, less affluent Americans may actually bear *more* than their fair share of financing the burdens of government!

## VI. SOCIO-ECONOMIC STATUS, RACE, AND REGRESSION

Even more troubling, regression’s socio-economic skew has a racial component. This is inevitable in light of present income distributions and given the long-term economic consequences of racial discrimination. The racial component is inevitable because less affluent Americans *remain* disproportionately black and brown.<sup>94</sup> The Great Recession of 2008 has taken a fearsome toll on Americans generally—almost daily we hear reports of the disappearing middle class.<sup>95</sup> Adding to this concern is the fact that Americans of color, latecomers to the middle class, are losing the battle to remain there at greater rates. Unemployment rates for African Americans have persistently been twice those of non-Hispanic whites.<sup>96</sup> As of January 2014, the seasonally adjusted unemployment rate for whites was 5.7% (17.5% for sixteen to nineteen year olds); for black or African Americans, the comparable figures were 12.1% and 38%.<sup>97</sup> Hispanic or Latino Americans suffer rates greater than those of white Americans, though they have been and remain less hard hit than African Americans.<sup>98</sup> Average household incomes show a similar disparity: As of 2009, white households

93. See generally Martin A. Sullivan, *Taxing the Sins of the Poor: Do Two Wrongs Make a Right?*, 2000 TAX NOTES TODAY 54-104 (2000) (discussing regressive effect of cigarette taxes and charges incident to state-run lotteries and suggesting that cigarette taxes be reduced and government-sponsored lotteries be discontinued).

94. See SUZANNE MACARTNEY ET AL., POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007–2011, US CENSUS BUREAU (Feb. 2013), available at <http://www.census.gov/prod/2013pubs/acsbr11-17.pdf>.

95. See, e.g., Robert Reich, *America’s Vanishing Middle Class*, SALON.COM (Aug. 31, 2012, 3:34 PM), [http://www.salon.com/2012/08/31/americas\\_vanishing\\_middle\\_class](http://www.salon.com/2012/08/31/americas_vanishing_middle_class); Nelson D. Schwartz, *The Middle Class Is Steadily Eroding. Just Ask the Business World.*, N.Y. TIMES (Feb. 2, 2014), [www.nytimes.com/2014/02/03/business/the-middle-class-is-steadily-eroding-just-ask-the-business-world.html](http://www.nytimes.com/2014/02/03/business/the-middle-class-is-steadily-eroding-just-ask-the-business-world.html).

96. See BUREAU OF LABOR STATISTICS, *Table A-2. Employment Status of the Civilian Population by Race, Sex, and Age* (Feb. 7, 2014), <http://www.bls.gov/news.release/empsit.t02.htm>.

97. *Id.*

98. See BUREAU OF LABOR STATISTICS, *Table A-3. Employment Status of the Hispanic or Latino Population by Sex, and Age* (Feb. 7, 2014), <http://www.bls.gov/>



had an average income of \$51,861;<sup>99</sup> black households had an average income of \$32,584;<sup>100</sup> and Hispanic households had an average income of \$38,039.<sup>101</sup> The “wealth gap” between white Americans and Americans of color is widening.<sup>102</sup> In 2011, the average white household had almost eighteen times as much wealth as the average African American household and almost fifteen times that of the average Latino household.<sup>103</sup> Americans generally are losing ground. Income inequality is accelerating—presently the top 1% of Americans hold 42.1% of all financial wealth;<sup>104</sup> the bottom 80% hold only 4.7% of all financial wealth.<sup>105</sup> Indeed, since the onset of 2008’s Great Recession, the number of American households with *no* marketable assets has increased from 18.6% to 22.5%.<sup>106</sup>

How does all of this lead to political invisibility? Let me provide examples of the effects of intertwined lower socio-economic status and reliance on regressive revenue generating systems—even with safe harbors such as exemptions—on potential political leverage.

#### A. *Income Taxes*

Flat income tax rates have a regressive effect. To the extent, however, that tax relief measures protect those in the lowest income strata from liability (for example, through the federal EITC, or a state equivalent thereof), such taxpayers may be viewed as having no basis for complaint of unfairness. This is, of course, in spite of the fact that such tax relief can only be provided to those least able to pay as the result of deliberate tax policy. On the other hand, you may be surprised to learn that—of the forty-one states (including the District of Columbia)<sup>107</sup> that tax individual incomes—only twenty-four in addition to the District of Columbia permit

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news.release/empsit.t03.htm (noting seasonally adjusted unemployment rate for Hispanics, for January 2014, was 8.4% overall).

99. U.S. CENSUS BUREAU, *Table 691. Money Income of Households—Median Income by Race and Hispanic Origin, in Current and Constant (2009) Dollars: 1980 to 2009* (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0690.pdf>.

100. *Id.*

101. *Id.*

102. *See id.* (showing from 2000–2009, median household income for white households rose by 18.1% while rising just 9.8% for black households and 14.6% for Hispanic households).

103. *See* U.S. CENSUS BUREAU, *Net Worth and Asset Ownership of Households: 2011* (June 21, 2013), available at <http://www.census.gov/people/wealth>.

104. G. William Domhoff, *Wealth, Income, and Power, WHO RULES AMERICA?* (Feb. 2013), <http://www2.ucsc.edu/whorulesamerica/power/wealth.html>.

105. *Id.*

106. *See* Edward N. Wolff, *The Asset Price Meltdown and the Wealth of the Middle Class* 9 (Soc’y for the Study of Econ. Inequality, Working Paper, 2012), available at [http://appam.confex.com/data/extendedabstract/appam/2012/Paper\\_2134\\_extendedabstract\\_151\\_0.pdf](http://appam.confex.com/data/extendedabstract/appam/2012/Paper_2134_extendedabstract_151_0.pdf).

107. *See State Income Tax Rates, supra* note 66.

an earned income tax credit for reporting purposes.<sup>108</sup> Further, in four of those twenty-five taxing jurisdictions, the credit is not refundable.<sup>109</sup> That is, the taxpayer may be relieved from liability but will not receive a check from the state treasury should liability be negative. By the way, Pennsylvania does not have an EITC in its income tax system at all!<sup>110</sup>

### B. *Retail Sales Taxes*

Retail sales taxes have a regressive effect, but that effect may be eased through exemption. As I have noted, "foods-not-ready-to-eat" are exempt from sales tax but the exemption does not extend to prepared foods. To the extent then that Pennsylvanians purchase and consume prepared foods, the retail sales tax applies.

This regressive effect remains particularly troubling when one considers the plight of those who live in fresh-food deserts<sup>111</sup> or who for legitimate non-recreational reasons frequently purchase prepared foods. For residents in fresh food deserts, because of generally impoverished economic circumstances, the rates of participation in non-exempt transactions may actually be higher than comparable rates for their more affluent counterparts. Of necessity, they purchase from prepared-food providers in their neighborhoods. Result: no exemption.

The second group? Imagine the person who is trying to manage two to three part-time jobs in a difficult quest to remain financially solvent.<sup>112</sup> This is not an uncommon pattern in this tough economic environment. The work demands of this arrangement will likely leave little time to purchase and prepare "foods-not-ready-to-eat." Of necessity they, too, purchase from prepared food providers. Result: no exemption. Who would have thought that a sales tax exemption for "foods-not-ready-to-eat" would prove particularly advantageous to suburban residents with nine-to-five jobs who enjoy the convenience of neighborhood supermarkets while providing relatively less relief, if any, for their less financially fortunate counterparts?

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108. IRS, *State and Local Government EITC Programs*, <http://www.eitc.irs.gov/EITC-Central/press/overview/stateeitc> (last updated June 12, 2014).

109. *Id.*

110. *See id.*

111. *See generally* JUDITH BELL ET AL., THE FOOD TRUST, ACCESS TO HEALTHY FOOD AND WHY IT MATTERS (2013), available at [http://thefoodtrust.org/uploads/media\\_items/access-to-healthy-food.original.pdf](http://thefoodtrust.org/uploads/media_items/access-to-healthy-food.original.pdf). Food deserts are census tract located in either urban or rural low-income areas having no ready access to fresh, healthy, and affordable food available through grocery stores or affordable food retail outlets. *See id.* at 9–11. These areas are, instead, served only by fast food restaurants and convenience stores offering few healthy food options. *See id.* at 6.

112. *See* BUREAU OF LABOR STATISTICS, *Table A-16. Persons Not in the Labor Force and Multiple Jobholders by Sex, Not Seasonally Adjusted* (Feb. 7, 2014), <http://www.bls.gov/news.release/empst.t16.htm> (showing that about 5% of workers hold multiple jobs).

C. *Property Taxes*

Property taxes, relied upon on the local level, are widely though not universally viewed as having a regressive effect.<sup>113</sup> Rates of ownership of taxable property will almost certainly be lower among less affluent persons. Further, it logically follows that to the extent that the less affluent are property owners, their properties are likely to have lower market values.<sup>114</sup> Several studies have shown, however, that such property owners are statistically more likely to have a higher percentage of that value subjected to the property tax levy.<sup>115</sup> In other words, assessment ratios for such properties have been comparatively higher than for similar properties of greater value. Hence, comparatively higher property tax burdens will ensue.

Renters will also likely bear some part of the property tax cost for the spaces in which they reside. This cost may be passed through to those renters from property owners in the form of higher rents.<sup>116</sup> They will be unable, however, to deduct any part of that levy for income tax purposes should they be so fortunate as to itemize. Further, as renters they have no political voice. Simply put, they are not property owners!

As noted earlier, income, retail sales, and property taxes are all major sources of governmental revenues. Because of the regressive structure of most of these sources, in combination with income and wealth distribu-

113. Opinions differ. Compare George E. Peterson, *The Issues of Property Tax Reform*, in PROPERTY TAX REFORM 5 (George E. Peterson ed., 1973) (asserting that “[t]here is considerable agreement among the authors that the property tax as administered today, with all the variations of property tax rates that actually occur among jurisdictions, and with the flaws of assessment, is a regressive tax”), with HENRY J. AARON, WHO PAYS THE PROPERTY TAX?: A NEW VIEW 38 (1975) (arguing that property tax is not regressive). The consensus view is likely best captured in RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE THEORY AND PRACTICE 268 (3d ed. 1980) (arguing that property tax is mildly regressive).

114. See George C. Galster et al., *Estimating the Costs of Concentrated Poverty to American Neighborhoods* 19 (Nat’l Poverty Ctr. Working Paper Series, Working Paper No. 06-42, Oct. 2006), available at [https://www.maxwell.syr.edu/uploadedFiles/cpr/events/cpr\\_seminar\\_series/previous\\_seminars/Galster.pdf](https://www.maxwell.syr.edu/uploadedFiles/cpr/events/cpr_seminar_series/previous_seminars/Galster.pdf) (showing that property values decline substantially when neighborhood poverty rates exceed 20%).

115. See Alan Finder & Richard Levine, *Unequal Burden: New York’s Property Tax; Hodgepodge of Home Valuations Produces Disproportionate Taxes*, N.Y. TIMES (July 6, 1991), <http://www.nytimes.com/1991/07/06/nyregion/unequal-burden-new-york-s-property-tax-hodgepodge-home-valuations-produces.html>. See generally Lee Harris, ‘Assessing’ Discrimination: The Influence of Race in Residential Property Tax Assessments, 20 J. LAND USE & ENVTL. L. 1 (2004) (assessing extent to which levies upon taxable property may be driven by relatively lower market values).

116. See Mireya Navarro, *Among Cuomo’s Proposals, a Tax Break for Renters*, N.Y. TIMES (Jan 9, 2014), [http://www.nytimes.com/2014/01/10/nyregion/among-cuomos-proposals-a-tax-break-for-renters.html?\\_r=0](http://www.nytimes.com/2014/01/10/nyregion/among-cuomos-proposals-a-tax-break-for-renters.html?_r=0). Again, the extent to which this systematically occurs is difficult to determine. Normatively, rents are likely a product of supply and demand, and price would be divorced from the costs otherwise incurred by landlords. This outcome may be affected, however, when socio-economic status and race are factored into the equation.

tions, each source imposes additional costs, relatively speaking, on those less able to bear those costs. This economic reality is no less skewed with regard to excise taxes—sin taxes, in particular.

#### D. “Sin Taxes”

Consider our current view of smokers. Thirty years ago, cigarette ads were ubiquitous on television.<sup>117</sup> Iconic images from that bygone period include the Marlboro Man, whose handsome, rugged demeanor as seen through a haze of cigarette smoke depicted decisiveness, sophistication, and poise—all desirable characteristics, to be sure.<sup>118</sup> Further, the tobacco industry’s marketing effort cut across gender lines. Television advertisements for Virginia Slim cigarettes targeted female smokers. These ads featured the newly liberated, pert, saucy, and attractive Virginia Slims girl sashaying into camera view, cigarette in hand, as the jingle over intoned: “You’ve come a long way, Baby. You’ve got your own cigarette now, Baby.”<sup>119</sup> As a society, we now look down upon smokers.<sup>120</sup> Our present smoker’s image is that of the haggard cancer victim in the public service announcement who struggles to speak in spite of her tracheotomy. She implores the viewer not to smoke because smoking can kill you.<sup>121</sup>

Public attitudes about smoking mirror this shift in media messaging. For example, in July of 2001, only 39% of adults surveyed in the United States thought smoking should be “totally illegal” in “all public places”; by July 2013, that percentage had risen to 55%.<sup>122</sup> In addition, a 2012 survey found that 94% of respondents viewed cigarettes as a problem to society.<sup>123</sup> Furthermore, the Surgeon General recently released a report marking the fifty years since the first Surgeon General’s warning about the harmful effects of smoking, a 978 page compendium railing against the harmful effects of smoking.<sup>124</sup>

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117. See generally Richard W. Pollay, *Exposure of US Youth to Cigarette Television Advertising in the 1960s*, 3 TOBACCO CONTROL 130 (1994).

118. See JULIANN SIVULKA, SOAP, SEX, AND CIGARETTES: A CULTURAL HISTORY OF AMERICAN ADVERTISING 235 (2012).

119. HAL WEINSTEIN, HOW AN AGENCY BUILDS A BRAND—THE VIRGINIA SLIMS STORY 16 (1969), available at <http://legacy.library.ucsf.edu/tid/efc64e00/pdf>; see also SIVULKA, *supra* note 118, at 278.

120. See Omar Shafey et al., *The Tobacco Atlas*, THE AM. CANCER SOC’Y (3d ed. 2012), <http://www.cancer.org/aboutus/globalhealth/cancerandtobaccocontrol/resources/the-tobacco-atlas-3rd-edition>.

121. See *Anti-Smoking Ads 2012: CDC Offers GRAPHIC Reasons to Quit Smoking*, HUFFINGTON POST (Mar. 19, 2012, 4:08 PM), [http://www.huffingtonpost.com/2012/03/19/cdc-anti-smoking-ads-2012\\_n\\_1364946.html](http://www.huffingtonpost.com/2012/03/19/cdc-anti-smoking-ads-2012_n_1364946.html).

122. *Tobacco and Smoking*, GALLUP, <http://www.gallup.com/poll/1717/tobacco-smoking.aspx> (last visited Aug. 5, 2014).

123. *Id.*

124. See generally OFFICE OF THE SURGEON GEN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL (2014), available at <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.

Similarly, gambling is negatively perceived by the public. It is generally viewed as a socially harmful activity.<sup>125</sup> For example, a 1999 Gallup survey found that 56% of adults “believed that casinos damage everyday family and community life.”<sup>126</sup> Furthermore, in a recent survey of Iowans, when asked whether “[g]ambling is dangerous for family life,” 64% of respondents agreed,<sup>127</sup> and 51% agreed that “[g]ambling is a harmful form of entertainment.”<sup>128</sup>

Finally, those who drink (especially to excess) are regarded with suspicion.<sup>129</sup> While alcohol consumption on some level is the norm in the United States, 86% of Americans believe that alcohol is a problem in society.<sup>130</sup> The likely targets of that sentiment are heavy drinkers and alcoholics, who continue to be stigmatized. For example, a 2011 study found that, when asked whether a social stigma associated with alcoholism persisted, 83% of psychiatrists and 70% of doctors asserted there was a strong stigma.<sup>131</sup>

Think of what this portends insofar as political visibility is concerned. How likely is it that successful taxpayer coalitions built upon patterns of personal tobacco consumption might form and participate in the political process? Moreover, with public attitudes generally hostile to gambling’s effects on society, it is unlikely that gamblers’ views receive much credence in the political arena. Finally, with attitudes generally averse to drinking and drinkers, it is difficult to imagine such individuals organizing powerfully. Further complicating this picture, an economic skew clearly exists with regard to cigarette and gaming taxes. Numerous studies have established that sin taxes—especially on tobacco and gaming—are disproportionately borne by those lower on the socio-economic scale.<sup>132</sup> Currently available data suggest that the disparity between the propensity to smoke for individuals who live below the poverty level and smokers who live above the poverty level is steadily growing. In 1995, a person living below the poverty level was 37% more likely to smoke than a person living above the poverty level; by 2011, that number had risen to 62%.<sup>133</sup> Simi-

125. See GERDA REITH, *GAMBLING: WHO WINS? WHO LOSES?* 226–27 (2003).

126. *Id.* at 227.

127. MELVIN E. GONNERMAN, JR. & GENE M. LUTZ, *GAMBLING ATTITUDES AND BEHAVIORS: A 2011 SURVEY OF ADULT IOWANS* 43 (2011), available at [http://www.csbs.uni.edu/dept/csbr/pdf/Gambling\\_Attitudes\\_Behaviors\\_Report.pdf](http://www.csbs.uni.edu/dept/csbr/pdf/Gambling_Attitudes_Behaviors_Report.pdf).

128. *Id.*

129. See James W. West, *Is There Still a Stigma with Alcoholism?*, BETTY FORD CTR. (Sept. 27, 2011), <http://www.bettyfordcenter.org/treatment/doctors-office/is-there-still-a-stigma-with-alcoholism.php>.

130. See *Alcohol and Drinking*, GALLUP, <http://www.gallup.com/poll/1582/Alcohol-Drinking.aspx> (last visited Aug. 5, 2014).

131. See West, *supra* note 129.

132. See generally Rosemary Hiscock et al., *Socioeconomic Status and Smoking: A Review*, 1248 ANNALS N.Y. ACAD. OF SCI. 107 (2012).

133. Compare CDC, *Current Cigarette Smoking Among Adults—United States, 1995*, MORBIDITY AND MORTALITY WEEKLY REPORT (Dec. 26, 1997), <http://www.cdc.gov/mmwr/preview/mmwrhtml/00050525.htm>, with CDC, *Current Cigarette Smoking*

larly, several studies have concluded that the implicit gaming tax falls disproportionately on less affluent taxpayers.<sup>134</sup> The picture with regard to alcohol usage and consequent tax incidence is more mixed. One recent study reported that while patterns of alcohol use and problem prevalence varied among ethnic groups, rates of abstinence from alcohol use were generally higher for black and Hispanic men than they were for white men. The study concluded that whites and Native Americans have a greater risk for alcohol use disorders.<sup>135</sup> Alcohol dependence, however, when it occurred, was likely to be more problematic for black and Hispanic men.<sup>136</sup> These data, however, provide little insight into tax incidence. Economists view taxes on alcohol as generally, relatively underproductive. Unlike taxes on tobacco products, alcohol taxes have not been raised in recent decades. Proponents for increases argue that were taxes on alcohol raised, given patterns of alcohol consumption, the vast majority of Americans would be unaffected. In short, no definitive conclusions can be drawn with regard to the likely incidence of taxes on alcohol.

#### E. *One Who Pays a Tax—Any Tax—Is a Taxpayer*

I intend no value judgment in sharing with you, in particular, the facts about the incidence of sin taxes. The primary question remains: How much political credence do we presently accord to these taxpayers? I suspect relatively little. They are invisible. Indeed, if, as Jean-Baptiste Colbert asserted, “[t]he art of taxation consists of so plucking the goose as to obtain the most feathers with the least possible amount of hissing,”<sup>137</sup> sin taxes are near perfect taxes, for they are “easier to collect than income taxes and less visible than direct taxes.”<sup>138</sup> The prevailing sentiment among lawmakers and their advisors seems to be that, for example, “[n]o

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*Among Adults—United States, 2011*, MORBIDITY AND MORTALITY WEEKLY REPORT (Nov. 9, 2012), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6144a2.htm>.

134. See Thomas A. Garrett, *Earmarked Lottery Revenues for Education: A New Test of Fungibility*, 26 J. EDUC. FIN. 219, 237 (2001) (“[L]otteries are generally accepted as regressive . . . .”); Ross Rubenstein & Benjamin Scafidi, *Who Pays and Who Benefits? Examining the Distributional Consequences of the Georgia Lottery for Education*, 55 NAT’L TAX J. 223, 236 (2002) (“[T]he vast majority of research has found lotteries to be a highly regressive method of raising revenue . . . .”).

135. See Karen Chartier & Raul Caetano, *Ethnicity and Health Disparities in Alcohol Research*, NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/arh40/152-160.htm> (last visited Aug. 6, 2014).

136. See Frank H. Galvan & Raul Caetano, *Alcohol Use and Related Problems Among Ethnic Minorities in the United States*, NAT’L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/arh27-1/87-94.htm> (last visited Aug. 6, 2014).

137. CHRISTOPHER SNOWDON, ADAM SMITH INST., *THE WAGES OF SIN TAXES 5* (2012), available at [http://www.adamsmith.org/sites/default/files/research/files/The%20Wages%20of%20Sin%20Taxes%20Cj%20Snowdon%20ASI\\_0.pdf](http://www.adamsmith.org/sites/default/files/research/files/The%20Wages%20of%20Sin%20Taxes%20Cj%20Snowdon%20ASI_0.pdf) (quoting Jean-Baptiste Colbert).

138. *Id.* at 8.

one can get mad at you for taxing people who drink too much . . . .”<sup>139</sup> Nevertheless, the persons who bear these costs—including the burden of sin taxes—are taxpayers, and they should be heard. They should not be ignored—treated as invisible because they have been relieved of liability for compelling policy reasons, or because the levies have a dimly appreciated regressive economic effect, or because they are imposed upon behaviors that strike some as unseemly.

## VII. CONCLUSION

Politicizing the federal tax policy discourse—indeed, tax policy discourse in general—with this most disingenuous demand for “skin” erroneously and wrongly characterizes a significant percentage of Americans as free-riders who contribute little or nothing to government finances. The characterization distorts fiscal policy debate in several important ways. *First*, at its extreme, the putatively unmet demand deprives affected citizens of a political voice on that governmental level, whatever it may happen to be. On the federal level, the vast majority of those who fall within the 47% do so because of deliberate Congressional action. I suspect that the vast majority of these Americans would opt for more income, consequent tax liability notwithstanding. On the national level, taxpayers, already disproportionately burdened with low visibility taxes or levies imposed upon behaviors deemed undesirable (i.e., smoking, drinking, or engaging in gaming activities) on the state and local level, are likely further disadvantaged both politically and fiscally on both the state and the federal level. *They become invisible.* *Second*, meaningful tax reform at all levels could be thwarted or stalled due to an incomplete understanding of the demands and consequences of fiscal federalism leading—in a worst case scenario—to further distortions of relative tax burdens. *Third*, unchecked increased reliance on low visibility taxes, special taxes, and non-general sources of revenue (the sin taxes, in particular, given the amounts of revenue raised by these levies), all of which tend to be regressive, accelerates opacity rather than transparency in fiscal practices. As a practical matter, our failure to understand how we all pay compromises the effort to reliably determine the extent to which any “share” could be deemed “fair.” Too much of the aggregate tax burden is invisible, poorly understood, and simply unknown.

Americans who do not pay federal income tax have “skin in the tax game.” They bear, at least, their fair share of the economic burden of sustaining government. Indeed, the argument that they bear more than their fair share is compelling. Yet because of the way in which this burden is borne, these Americans may gain little in the way of political traction in

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139. Catherine Rampell, *For Cash Strapped States, Sin Is Sure Lucrative*, N.Y. TIMES (Apr. 17, 2010), <http://www.nytimes.com/2010/04/18/weekinreview/18rampell.html> (quoting Peter L. Faber, tax lawyer and partner at McDermott Will & Emery in New York).

spite of their financial participation. In the final analysis, attention to tax matters has inherent within it elements of both economic justice and racial justice. All Americans participate financially in bearing the burdens of government; as such, all should share in the benefits of government. Simultaneously, if some measure of economic justice is to be achieved, attention must be accorded to the fairness and, as appropriate, remediation of disparate tax burdens.

Overall, the demand for "skin," with its dubious link to the realities of aggregate tax burdens, ignores reality. It is pernicious and potentially economically and racially divisive. It breeds a disregard for and foments a failure to accommodate competing interests across the socio-economic spectrum. At worst, it leads to essential disenfranchisement—invisibility for those taxpayers whose tax burdens go unrecognized. Simply put, *all* Americans but for those who are abjectly destitute have "skin in the tax game." Through some mix of the several revenue-generating systems of whatever description, all have financially invested in this "civilized society." Less affluent taxpayers are no less entitled than are their more affluent counterparts to having questions of allocation of the burdens of government at all levels resolved as fairly as possible. The debate with regard to tax issues on each level must, as a matter of fairness and economic justice, acknowledge the revenue burdens concurrently borne on all levels.

In short, attention to economic justice in our revenue systems *should* be a matter of national concern.

So I have now talked about the "taxes" paid and the "*we*" who pay them. That leaves the "*civilized society*."

I will simply remind you of Dr. King's vision of the civilized society. Again, he believed that economic justice must necessarily include an economic bill of rights, promising *all* citizens the right to a job, the right to an adequate education, and the right to decent housing and a livable income. I believe that, were he alive today, he would agree that economic justice must also include attention to achieving a fairer allocation of the burdens of financing government.





2014]

## Donald A. Giannella Memorial Lecture

### WHAT IS RELIGIOUS “PERSECUTION” IN A PLURALIST SOCIETY?

SUSAN J. STABILE\*

We hear about religious persecution throughout the [third] world, but the Catholic Church is being persecuted right here in the United States by our own government.”

—Rep. Ted Poe, February 1, 2012<sup>1</sup>

“I’ve said a number of times that persecution is on a continuum. . . . I think America today is in the process of moving from level one [Social Persecution on the basis of religion] to level two [Legal Persecution].”

—Rep. Rebecca Hamilton, March 15, 2013<sup>2</sup>

“The persecution of religion in America has begun, with the Catholic Church a prime target.”

—Russell Shaw, author and former communications director for USCCB, November 16, 2011<sup>3</sup>

“Do I believe Christians will face real persecution, such as loss of livelihood, civil penalties, physical abuse or even jail? Absolutely.”

—Matt Barber, VP of Liberty Counsel Action, June 28, 2013<sup>4</sup>

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1. Ted Poe, *Government Persecution of Catholic Christians—in America*, U.S. CONGRESSMAN TED POE (Feb. 1, 2012), <http://poe.house.gov/index.cfm/2012/2/government-persecution-of-catholic-christians-in-america>.

2. Rebecca Hamilton, *Degrees of Christian Persecution: Where Does America Fit?*, PATHEOS (Mar. 15, 2013), <http://www.patheos.com/blogs/publiccatholic/2013/03/degrees-of-christian-persecution-where-does-america-fit/>.

3. Russell Shaw, *The Persecution of Religion Has Begun*, PATHEOS (Nov. 16, 2011), <http://www.patheos.com/Resources/Additional-Resources/Persecution-of-Religion-Has-Begun-Russell-Shaw-11-16-2011.html>.

4. Matt Barber, *Mock ‘Marriage’ and the Death of Freedom*, WND COMMENTARY (June 28, 2013, 8:27 PM), <http://www.wnd.com/2013/06/mock-marriage-and-the-death-of-freedom/>.

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## I. INTRODUCTION

ON a cursory look one afternoon, I found several websites devoted to the subject of religious persecution in the United States. One site, *Christian Persecution in America*, has as its tagline, “Bringing awareness, answers and resources to the question of Christian Persecution in America.” Another, *Persecution.org*, subtitled “Your Bridge to the Persecuted Church,” has 668 entries for the U.S.

Even blogs and websites not fully devoted to the subject contain individual entries discussing religious persecution in the United States with titles like (and again, this was found with a pretty quick search):

- The Beginning of the Anti-Catholic Persecution in America—Again
- The Coming Persecution
- Defending the Persecuted Faith
- Back to the Ghetto
- Confronting Religious Persecution in America
- Persecution and Martyrdom of the Catholic Church in America
- Persecution in America

There is even a “Wiki How” entry for How to Handle Anti-Catholic persecution in the United States. And next month will see the release of a star-studded film titled *Persecution*, about the suppression of Christians in America. A second film of the same name will be released later this year as a short film to submit to the Cannes film festival.

Any number of issues have given rise to the use by various persons of the label “persecution” to describe the treatment of Catholic or other Christians in this country:

- The Health and Human Services mandate that employers (including Catholic universities and hospitals) provide contraceptive coverage for their employees, which the outgoing president of the Ethics and Religious Liberty Commission characterized as “by definition, a form of religious persecution.”<sup>5</sup>
- The lack of satisfactory religious exemptions in state statutes governing same-sex marriage as well as lawsuits against companies who refuse to provide services to gay couples.
- Laws that seek to force Catholic adoption and foster care agencies to allow gays to adopt children (or punish those who do not).
- Restrictions on evangelization in the military.

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5. Bob Allen, *SBC Leader Calls HHS Mandate ‘Persecution’*, ABP NEWS (Apr. 10, 2013), <http://www.abpnews.com/culture/politics/item/8391-sbc-leader-calls-health-care-mandate-persecution#.U1mx7-ZdVpE> (quoting Richard Land, outgoing president of Ethics and Religious Liberty Commission).

- The scorning or ostracizing of certain public figures for their religious beliefs—Tim Tebow and sportscaster Chris Broussard are two that come to mind in recent years, as does the temporary suspension of Phil Robertson from A&E over anti-gay and allegedly racist statements (although it is not clear to me the last was anything more than a marketing ploy by A&E).
- Christian students being ridiculed for their beliefs or universities, or the denial of funding to Christian fraternities, sororities, or clubs because they restrict membership to Christians.
- Not being able to put Christian symbols on public buildings, such as the Ten Commandments on school buildings.

Some of the language of persecution has come from individual American religious leaders, some from Catholic or conservative Protestant legislators, some from conservative media, and some from ordinary citizens. While I hope and expect there will be less of that language coming from American bishops, given their shift in focus toward religious persecution abroad—that is, places Cardinal Timothy Dolan referred to in his final presidential address to the USCCB as the “dramatic front lines” of the battle of religious freedom—there is little reason to think the language will disappear in other venues.<sup>6</sup>

What I would like to explore in this talk is how we should think about what we do and do not mean by religious persecution in a pluralist society like the United States and whether we should be concerned with the use of the term “persecution” for the kind of issues that have given rise to that label in the United States. (Spoiler alert: I think we should be concerned).

To be very clear at the outset: I am not saying we do not have what we might term a “religious freedom problem” in the United States (and a fairly large one at that); I think there are numerous examples of things that can fairly be characterized as failures to give sufficient respect for religious freedom. I sadly think it is the case both that some people have too narrow an understanding of what religious freedom should mean, and that there is generally much less tolerance for religious-based claims in the public square than there once was. This translates into a grudging willingness on the part of many to tolerate only a “private, personal freedom that lacks space for public expression,”<sup>7</sup> essentially equating religious freedom with freedom to unobtrusively worship. I think this is a serious problem

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6. Cardinal Timothy M. Dolan, Archbishop of New York, President of the U.S. Conference of Catholic Bishops (USCCB), Presidential Address to the USCCB General Assembly (Nov. 11, 2013), *available at* <http://www.usccb.org/about/leadership/usccb-general-assembly/2013-november-meeting/farewell-presidential-address-cardinal-dolan.cfm>.

7. R.R. Reno, *Our Secular Future: The Redefinition of Religious Liberty in American Society*, AM. MAGAZINE (Feb. 24, 2014), <http://americamagazine.org/issue/our-secular-future>.

and nothing I say here is meant to minimize that. My issue is with characterizing these as instances of religious “persecution.”

## II. WHAT DOES PERSECUTION MEAN?

Stepping back from this current use of the term for some of the examples I just mentioned, what do we understand by the word “persecution”?

*Black’s Law Dictionary* defines “persecution” as “[v]iolent, cruel, and oppressive treatment directed toward a person or group of persons because of their race, religion, sexual orientation, politics, or other beliefs.”<sup>8</sup> *The American Heritage Dictionary of the English Language* says that “persecute” means “[t]o oppress or harass with ill-treatment, especially because of race, religion, gender, sexual orientation, or beliefs.”<sup>9</sup> *Random House College Dictionary* says that “persecute” means “to oppress with injury or punishment, for adherence to principles or religious faith.”<sup>10</sup>

One of the places we see the term “persecution” used in the American legal system is in the asylum context. An applicant for asylum in this country must demonstrate a well-founded fear of persecution. As anyone who has any familiarity with this system knows, it is not easy to meet this requirement for being granted asylum in the U.S. The Ninth Circuit observed in *Li v. Ashcroft*<sup>11</sup> that “caselaw characterizes persecution as an extreme concept, marked by the infliction of suffering or harm . . . in a way regarded as offensive.”<sup>12</sup> To constitute persecution for purposes of asylum, the conduct in question must involve serious physical violence, torture, threat of physical violence or torture, detention and confinement, creating serious emotional or psychological harm (not merely harassment or ostracism) or substantial economic deprivation (not merely economic disadvantage).

In 1998, a bill was introduced in the House—the Freedom from Religious Persecution Act<sup>13</sup>—designed to take action against nations that condone or conduct religious persecution. Under the proposed law, the activities that constituted “persecution” were “abduction, enslavement, killing, imprisonment, forced mass relocation, rape, crucifixion or other forms of torture, or the systematic imposition of fines or penalties which have the purpose and effect of destroying the economic existence of persons on whom they are imposed.”<sup>14</sup>

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8. BLACK’S LAW DICTIONARY 1257 (9th ed. 2009).

9. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2013), available at <http://ahdictionary.com/word/search.html?q=persecute&submit.x=0&submit.y=0>.

10. RANDOM HOUSE COLLEGE DICTIONARY 1074 (rev. ed. 1980).

11. 356 F.3d 1153 (9th Cir. 2004) (en banc).

12. *Id.* at 1158 (alteration in original) (internal quotation marks omitted).

13. H.R. 2431, 105th Cong. (1998).

14. H.R. REP. NO. 105-480, pt. 3, at 3 (1998).

Last summer, I spent some time in Amsterdam and Germany. Several experiences from that vacation came to mind as I was thinking about what I would say on this subject.

In Amsterdam, we visited the Church of Our Lord in the Attic. In the late sixteenth century, public celebration of the Catholic Mass was outlawed in Amsterdam when Protestants took over control of the city. Private Catholic worship was tolerated, so long as it was hidden from public view. In 1661, a wealthy Catholic merchant constructed a hidden church that occupied the entire top floor of his house and the two houses behind it. The Church of Our Lord in the Attic was essentially the parish church for Catholics living in Amsterdam for 200 years. A hidden church.

Amsterdam is also home to the Portuguese Synagogue. The Synagogue is the home of the oldest Jewish Community in the Netherlands, a community founded by Jews who had fled the persecutions of the Inquisition in Spain and Portugal. The Synagogue was home to a thriving community until World War II and today tells the story of the Jews who lived there. When Nazi Germany invaded Holland in 1940, there were around 140,000 Jews living there; after the war there were 20,000, most of the rest having perished.

Not being able to worship in public. Facing the Inquisition. Perishing in the Holocaust. These are things I have no difficulty labeling persecution, as we understand that term from dictionary definitions and from the use of the term in U.S. law.

And we see plenty of similar incidents in our world today. The arrest of Christian missionaries in North Korea and the physical assault and killings of people practicing their Christian faith there. (In one reported incident, a woman in North Korea was shot and killed because she kept a Bible in her home). Assyrian Christians have been told, "If you want to come back, convert to Islam, or you will be killed." The kidnapping of a clergyman in Syria. A car-bombing near a church that kills twenty Coptic Christians in Alexandria. These are not isolated instances. The Vatican's UN representative recently told a congressional panel that "flagrant and widespread persecution of Christians rages in the Middle East even as we meet."<sup>15</sup> And "[o]ther speakers at the hearing testified about violence against Christians in Indonesia, Vietnam, Nigeria, Myanmar, Sudan and Eritrea, among other [places]."<sup>16</sup>

Understandably, those who experience these kinds of suffering, as well as those who observe them, raise an eyebrow to the characterization of what goes on in the United States as persecution. A cartoon was posted not that long ago on Facebook that involved a conversation between two people.

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15. *Persecution of Christians 'Flagrant,' U.N. Nuncio Tells U.S. Congress*, AM. MAGAZINE (Mar. 3, 2014), <http://americamagazine.org/issue/persecution-christians-%E2%80%98flagrant%E2%80%99-un-nuncio-tells-us-congress>.

16. *Id.*

The first person said: I'm a Middle-Eastern Christian. In Egypt, we can't build new churches, and the authorities ignore the frequent violence committed against us. Almost all of us have been pushed out of Iraq. In Saudi Arabia, we have to hide inside to have church services. In some Muslim countries, converts to Christianity are sentenced to prison or death. In Sudan, we are decapitated for our faith by Islamists. We face a lot of religious oppression.

The second responds: Oh, I know about oppression too. I'm an American Christian. In the U.S., we aren't always allowed to put our religious symbols on every single public building. Sometimes bosses aren't allowed to restrict their workers' access to contraception. People sometimes say mean things about us on blogs. And worst of all, during Christmas, some people say, "Happy Holidays" instead of "Merry Christmas." I truly understand what you mean by religious oppression. I sure wish I had religious freedom.

After a pause, the first person replies with an expletive deleted. The cartoon was a caricature, but you get the point.

Another commentator posted a flow chart in November titled: Are you being persecuted? The first question was: "Did someone threaten your life, safety, civil liberties, or right to worship?" If yes—you are being persecuted. If no—the next question was: did someone wish you happy holidays? And for both no and yes, the next line read: You are not being persecuted.

The question here is:

### III. WHAT CONSTITUTES RELIGIOUS PERSECUTION IN A PLURALIST SOCIETY?

Let me try to address the question from the opposite direction, by talking about what I do not think can fairly be characterized as religious persecution.

First, failure to respect one's religion is not persecution. A lot of people who have no religious faith lack respect for anyone who is a religious adherent. (That is not always the case: I know many people who have no faith of their own who nonetheless respect the faith of others). And a lot of people who are religious have no respect for faiths other than their own. They see their faith as the one true way and see anything else as deserving of criticism and ridicule. (Listen to how some Christians talk about Buddhism. Or about how some mainline Protestants talk about Mormonism).

I happen to think that is unfortunate: I have written about the value of interfaith dialogue and why I think that we can all, whatever our own faith tradition, learn from people of different faiths. In my own case, I returned to Catholicism after spending twenty years as a Buddhist. Despite the fact that I no longer identify myself a Buddhist, I have enormous

respect for Buddhism and the Buddhist practitioners I know, and my Christian faith is all the stronger for what I learned from Buddhism.

But, while I think criticizing and ridiculing other faith traditions is unwise and unwarranted, that lack of respect is not persecution. No one has an entitlement that others respect their views, whether religiously based or otherwise. Ridicule is not persecution. Someone not wanting to listen to you talk about your religion is not persecution. Yet it is clear that for some people, not being respected or being ridiculed because of their religious faith, or not having their religious views respected, constitutes persecution.

I should add here that it is also not persecution if someone decides he or she does not like you anymore because of your religious views. I have—or had—a friend who no longer talks to me because of my faith. It saddens me deeply; I thought we had a real friendship. But that my former friend will no longer speak to me, while causing me great pain, is not persecution.

Second, giving a group legal rights that another group does not think they should have—that is inconsistent with the religious tenets of the second group's faith—does not constitute persecution against the second group. Granting legal recognition of same-sex marriage, for example, is not itself an act of persecution against those whose religion holds that same-sex marriage is immoral. Nor is legalizing abortion persecution against those whose religion opposes abortion as sinful.

That does not mean people cannot argue on the basis of their religion that the law ought not to do those things. People are free to argue—and should be free to argue—based on their religious beliefs that same-sex parents are harmful for children or that a society that allows abortion is a society that will not take sufficient steps to care for the marginalized and less well-off. Others may or may not find those arguments persuasive. But the fact that they do not is not persecution.

That raises a question of how such laws impact those who have religious opposition to them. We know that a law that, for example, allows same-sex marriage will raise questions about the extent to which others must respect those marriages, or that allowing abortion will raise questions about access. This leads to my next point.

Third, not every failure to give an exemption under the law or to provide a religious accommodation, in the case of a law that places a burden on religion, is persecution. By definition, living in a pluralist society means that not everyone shares the same views. What is sacrosanct to members of one faith may be something viewed as against the social good as defined by others. And by definition, not all freedoms can be absolute, because the exercise of one person's freedom may infringe on the freedom of others.

Conflicts inevitably arise, and take many forms, and have to be resolved.



How do we balance a state's interest in compulsory education of children against the Amish belief their children should not go to public school?<sup>17</sup>

How do we resolve a conflict between a state law banning drug use against the religious use of peyote?<sup>18</sup>

How do we resolve the conflict between the government's determination that contraception is part of health care and therefore must be provided as part of the provision of preventive services against the religious opposition of employers to the use of birth control?<sup>19</sup>

How do we reconcile the desire of Catholic social service organizations not to place children in same-sex households with our nondiscrimination laws?

And you can think of other examples.

In some of these cases, accommodations that protect religious beliefs will be made, sometimes voluntarily and sometimes because a court determines that the Constitution or statutory law requires it. But not always. Sometimes law and society will determine that other protected rights take precedence over religious claims for exemptions.

In my view, it is inappropriate to label such determinations persecution. That is, it is not always persecution to fail to provide special treatment or an exemption from a generally applicable law on the basis of religion, even where the consequence is that a religious adherent may have to pay a price for standing up for his or her religious convictions. The price of living in a society where we do not all share the same views is that not everyone's view can always be accommodated, and some will face some sacrifice as a cost of living consistently with their religious beliefs. So, to use a couple of recent examples:

A federal judge ruled in November that a law that allowed clergy members to avoid paying income taxes on compensation that is designated as a housing allowance is unconstitutional.<sup>20</sup> The tax exemption may be a desirable thing for clergy who do not receive very high incomes (although the same could be said for other lower-paying jobs), but that does not mean that the failure to provide it is religious persecution.

Or take the example of the New Jersey town of Ocean Grove.<sup>21</sup> The town had its origins in a campsite established by some Methodist preachers. Over time, the state of New Jersey granted the "Ocean Grove Camp Meeting Association" a charter, letting them create a police force and es-

17. See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

18. See generally *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

19. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

20. See *Freedom from Religion Found., Inc. v. Lew*, 983 F. Supp. 2d 1051 (W.D. Wis. 2013).

21. See Jonathan V. Last, *The Town FEMA Turned Down: The Tide Goes Out on Religious Liberty*, THE WEEKLY STANDARD (Nov. 25, 2013), [http://www.weeklystandard.com/articles/town-fema-turned-down\\_767137.html](http://www.weeklystandard.com/articles/town-fema-turned-down_767137.html).

establish an infrastructure allowing them to set aside the land for “the perpetual worship of Jesus Christ.”<sup>22</sup> (This was in 1870). Over the years, a town grew up and thrived. Although Ocean Grove later became a part of a larger township, it continued to operate its own services and retain independent authority over its laws.

When a storm destroyed the boardwalk of Ocean Grove in 1992, FEMA provided emergency relief funding. However, after Hurricane Sandy in 2012, FEMA refused to provide assistance, explaining that as a private, nonprofit organization, Ocean Grove was not eligible for federal assistance to repair the boardwalk because the property was owned by the Camp Meeting Association and the property was a “private religious ‘recreational facility.’”<sup>23</sup>

The issue is not the wisdom of FEMA’s actions. In fact, I think FEMA’s decision is a bad one. Ocean Grove and the state have managed to reach reasonable accommodation for a very long time. It has functioned as a “town,” and the boardwalk is essentially a public place that is one of the main attractions of the town.

But is it persecution to fail to provide federal relief to the town? Is it a violation of free exercise? I think that is a harder question.

I’m not saying that a failure to accommodate should never be labeled as persecution.

A failure to provide a religious exemption with costly consequences, motivated by animus against a particular religion, might properly be characterized as persecution.

A legal requirement that forced someone to violate his or her faith that is accompanied by fines so crushing that the person simply cannot act consistently with his or her faith may perhaps properly be characterized as persecution.

To take a recent example, a German family who had been homeschooling their children fled to the United States to avoid Germany’s prohibition against home schooling; Germany requires that all children be sent to public schools to “counteract the development of religious and philosophically motivated parallel societies.”<sup>24</sup> In 2001, an immigration judge in Memphis granted the family asylum, stating they would face persecution for their faith if they returned to Germany. The Sixth Circuit overturned that decision, saying “[t]here is a difference between the persecution of a discrete group and the prosecution of those who violate a generally applicable law.”<sup>25</sup> I think one could (and should) come to a

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22. *Id.*

23. *See FEMA Backs Down?*, THE WEEKLY STANDARD (Jan. 27, 2014), <https://www.weeklystandard.com/keyword/FEMA>.

24. *Justice Department: Home Schooling Not a ‘Right’*, CBN NEWS (Feb. 19, 2013), <https://www.cbn.com/cbnnews/politics/2013/February/Justice-Department-Home-Schooling-not-a-Right/>.

25. *Romeike v. Holder*, 718 F.3d 528, 530 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (2014).

different conclusion. That family cannot live in Germany and act consistently with their beliefs, any more than the Yoders could, giving rise to our exemption for the Amish from state education requirements. The penalties in Germany included not only crushing fines but criminal charges and the potential that children will be taken away from their parents.

But that is a much more nuanced determination than some of the current claims of religious persecution engage in. Not everything that might be labeled as discrimination (in the sense of burdening religious practice) is persecution.

Fourth, efforts to protect third parties from intrusive and uninvited religious proselytization are not persecution.

Many Christians view evangelization as a foundational part of their discipleship. It is not hard to understand why. “Go therefore and make disciples of all nations,” said Jesus to his disciples before his Ascension.<sup>26</sup> In his Apostolic exhortation, *Christifideles Laici*, Pope John Paul II wrote: “The entire mission of the Church, then, is concentrated and manifested in *evangelization*,” quoting Paul VI who wrote that, “[t]o evangelize . . . is the grace and vocation proper to the Church, her most profound identity.”<sup>27</sup>

Different Christian traditions have different ideas about what evangelization means. And some Christians are fairly aggressive in their efforts to try to bring other people to the Christian faith.

How do we decide when one person’s unwanted efforts to evangelize interfere with another person’s right not to be harassed?

In many circumstances, there is no need for government or any other third party interference to resolve this. If young Mormons ring my doorbell and want to talk to me about how Joseph Smith is the true prophet of God, I can say no thank you and close my door. When I lived in Brooklyn Heights in New York, ten blocks from the Watchtower Building, and was confronted on the street corner on an almost daily basis by Jehovah’s Witnesses who wanted to thrust copies of their literature in my hand, I could say no thanks and be on my way. (Sometimes I had to say it firmly or more than once, but no one forced me to listen).

There clearly are, however, circumstances where the object of the evangelization efforts cannot just say no. Those include situations where the person doing the evangelizing is in a position of authority over another or where the object of the evangelization is a captive audience.

In those circumstances, government and society need to consider how to balance competing interests. It seems to me it is neither illegitimate nor an instance of religious persecution to express concern, for example,

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26. *Matthew* 28:19.

27. POPE JOHN PAUL II, *CHRISTIFIDELES LAICI* ¶ 33 (1988), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_30121988\\_christifideles-laici\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_30121988_christifideles-laici_en.html).

at a teacher’s aggressive efforts to proselytize his or her students, or superiors in the military using their authority to try to convert subordinates.

The Second Vatican Council, in its Declaration on Religious Freedom, *Dignitatis Humanae*, recognized that “in spreading religious faith and in introducing religious practices everyone ought at all times to refrain from any manner of action which might seem to carry a hint of coercion or of a kind of persuasion that would be dishonorable or unworthy . . . .”<sup>28</sup> That same sentiment was expressed by Pope Paul VI in *Evangelii Nuntiandi*, where the Pope distinguished between “propos[ing] . . . the truth of the Gospel and salvation in Jesus Christ, with complete clarity and with a total respect for the free options which it presents” and coercively imposing the Gospel on others.<sup>29</sup> That same language was quoted by Pope Francis in his Message for World Mission Day.<sup>30</sup>

To be sure, deciding what is or is not intrusive or coercive is not always easy. Some people will say evangelization is permissible but proselytization is not. (And, indeed, Pope Francis was quoted this past year as saying Catholics should be engaged in evangelization, not proselytization). But that requires a shared definition of what those terms mean, and I think we lack that. (If you go to the dictionary, the two words have the same meaning: to convert or attempt to convert someone.)

What is intrusive? What is unwanted? Can we define these on an ex ante basis, or is it something to be handled on a case-by-case basis, the latter of which would not be very helpful in letting anyone know what is permissible and what is not.

The fact that such determinations are difficult, however, does not mean that all efforts to protect some against unwanted contact by those who would seek others to their faith are instances of religious persecution.

Fifth, mere efforts to limit religion in public schools and universities are not persecution (although Catholic online encyclopedia refers to the exclusion of religion in public schools with precisely that term).

Conflict over religion in public schools has existed for years. Today, we see a conflict between those who are troubled by what they see as an effort by courts and others to exclude God and religion completely from public schools. Others are concerned that conservative Christians are trying to impose their values on students. Both claim the First Amendment is on their side.

Going back to the point I just made about proselytization, it is clear that the Constitution prohibits public schools (as it should) from indoctrin-

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28. POPE PAUL VI, *DIGNITATIS HUMANAЕ* ¶ 4 (1965), available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_1965\\_1207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_1965_1207_dignitatis-humanae_en.html).

29. POPE PAUL VI, *EVANGELII NUNTIANDI* ¶ 80 (1975), available at [http://www.vatican.va/holy\\_father/paul\\_vi/apost\\_exhortations/documents/hf\\_p-vi\\_exh\\_19751208\\_evangelii-nuntiandi\\_en.html](http://www.vatican.va/holy_father/paul_vi/apost_exhortations/documents/hf_p-vi_exh_19751208_evangelii-nuntiandi_en.html).

30. See Francis’ *Message for World Mission Day*, ZENIT (Aug. 6, 2013), <http://www.zenit.org/en/articles/francis-message-for-world-mission-day>.

nating children in religion. But the range of things short of that, that could and has given rise to conflict, is enormous: student-led prayer, non-sectarian prayer, teaching of creationism as well as evolution, Bible readings in school, Bible study in school, and so-forth.

It may be that in the effort to avoid indoctrination, some courts have gone too far. It may be that those who would prefer to see a country and a world where no one has any religious belief push further than reasonable.

But, again, absent animus toward a particular religious group because of its beliefs, I am troubled by labeling the resolution of these conflicts persecution, even where I might disagree with the conclusion reached.

Finally, even freedom to worship is not absolute. By that I mean simply that there may be limits to the obligation of others to accommodate my worship needs. The most obvious example is the Supreme Court's *Smith* decision, saying that the Free Exercise clause permits the state to prohibit sacramental peyote use.<sup>31</sup> Sometimes worship needs may interfere with other legitimate interests. Or employers have to try to accommodate an employee's religious practices, but the requirement is a "reasonable" accommodation, not any accommodation an employee asks for.

In connection with some comments he made recently about the fate of Arizona's failed proposed legislation to protect religious freedom (and I recognize different people have different ways of characterizing this legislation), Ross Douthat gave some examples that I think draw helpful distinctions.<sup>32</sup>

First, "[i]f the federal government suddenly closed all religious schools in the United States, banned homeschooling, and instituted an anti-religious curriculum in public schools," he would have no hesitation labeling that persecution.<sup>33</sup> In contrast, "denying religious colleges access to public dollars would not rise to the same level."<sup>34</sup> While "[i]t would certainly create hardship and disruption, and weaken institutional religion in significant ways," it is not persecution.<sup>35</sup> Withholding a subsidy "leave[s] the basic liberty to educate one's children in one's own faith intact . . ."<sup>36</sup>

Second, a law requiring businesses to fire Christians would deserve the label persecution.<sup>37</sup> "But having the rules of a few professions sud-

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31. See generally *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

32. See Ross Douthat, *On Persecution*, N.Y. TIMES BLOG (Mar. 6, 2014, 12:50 PM), <http://douthat.blogs.nytimes.com/2014/03/06/on-persecution/>.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. See *id.*

denly pose new ethical dilemmas for religious believers" is "a challenge" or "a hardship," but not persecution.<sup>38</sup>

We can conceive of things that would constitute persecution in the United States, short of rounding up Christians and feeding them to the lions. But I do not see the label appropriately applied to any of the situations in which it is currently used.

#### IV. USE OF THE WORD "PERSECUTION" IN THIS CONTEXT

Let me now address a different question, that is: Is there a problem with the use of the term "persecution" to describe the way Christianity is viewed or treated societally and politically in the United States today?

I did not major in either government or theology as an undergraduate at Georgetown. I was an English major, which may explain why, when Michael Moreland told me I could speak to you about any subject broadly relating to law and religion, I settled on something having to do with language. I sat in an Honors English class as an undergraduate at Georgetown and happily spent forty-five minutes discussing the significance of the fact that Gerard Manley Hopkins begins the last quatrain of his poem *God's Grandeur* with the word "and" rather than the word "but." Thus, my starting point is that words matter. The language we use to talk about issues has a significant effect.

In this particular case, I worry about the effect of the use of the term "persecution" both on those who utter the words and those who hear them.

Let me start with the effect on those who claim to be persecuted—those who speak in terms of persecution. Once people see themselves as "persecuted," their instinctive reaction is to fight and resist. And the fight becomes fierce because a kind of circle the wagon mentality arises and anyone outside that circle is the enemy. And when we are talking in religious terms, the enemy is evil. If I believe I am persecuted, I must fight to defend myself. It is not just that someone disagrees with me, I am being attacked.

The result of language of persecution is demonization of those who disagree. In *The Myth of Persecution*, Candida Moss writes:

The myth of persecution is theologically grounded in the division of the world into two parties, one backed by God and the other by Satan. And everyone knows that you cannot reason with the devil. Even when the devil is not explicitly invoked, the rhetoric of persecution suggests that the persecutors are irrational and immoral and the persecuted are innocent and brave. In a world filled with persecution, efforts to negotiate or even reason with one's persecutors are interpreted as collaboration and moral compromise. We should not attempt to understand the other

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38. *Id.*

party, because to do so would be to cede ground to injustice and hatred.

This, then, is the problem with defining oneself as part of a persecuted group. Persecution is not about disagreement and is not about dialogue. The response to being “under attack” and “persecuted” is to fight and resist. You cannot collaborate with someone who is persecuting you. You have to defend yourself. When modern political and religious debates morph into rhetorical holy war, the same thing happens: we have to fight those who disagree with us. There can be no compromise and no common ground.<sup>39</sup>

Not surprisingly, this kind of attitude inhibits the ability to find any kind of common ground—indeed, to even acknowledge the possible existence of common ground. It also inhibits the ability of those who would stand fast to their religious beliefs to, in one commentator’s words, prepare “for a future as a (hopefully creative) religious minority, because it conditions them/us to constantly expect some kind of grand tribulation that probably won’t actually emerge.”<sup>40</sup>

There is also an unfortunate effect on those who hear the words. First, the more the language of religious persecution is used for things that are not really persecution, the greater the danger of trivializing the real persecution that exists. There becomes a real credibility problem that makes it much harder for people to take real threats against religion seriously. There is a bit of the “boy who cried wolf” too many times reaction. Moreover, many people feel that calling the kinds of things I have mentioned as examples here “persecution” cheapens and detracts from “real” instances of persecution around the world.

Second, the more the language of persecution is used, the more likely it is that opponents of a broad concept of religious freedom will tend to argue that anything short of persecution ought to be acceptable. It makes persecution that which we seek to avoid, rather than claiming a strong positive space for things that fall short of an accepted definition of persecution.

Third, people accused of persecution are also likely to go into a fight mode, creating the possibility of backlash that results in an even narrower understanding of what constitutes persecution and what kinds of protection ought to be granted on religious grounds.

For both those who claim to be persecuted and those accused of doing the persecution, the language of persecution ratchets up the “crazy” emotion, creating dangerous polarization. Candida Moss calls the language of persecution “discursive napalm” and “dialogue-ending lan-

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39. CANDIDA MOSS, *THE MYTH OF PERSECUTION: HOW EARLY CHRISTIANS INVENTED A STORY OF MARTYRDOM* 254 (2013).

40. Douthat, *supra* note 32.

guage”—and I think there is much truth in her conclusion that “[i]n the political and religious arenas, [abandoning the narrative of persecution] would allow us to find common ground in debates that are currently sharply polarized. Rather than demonizing our opponents, we could try to find points of agreement and work together.”<sup>41</sup>

The failure to do so risks turning some people off to Christianity altogether. That is a sad and unfortunate result—if people view Christians as cry-babies who rant about persecution, our evangelization efforts will falter; people will be much less likely to be able to hear the message of Christ.

In an interview with CNS News not long ago,<sup>42</sup> Archbishop Chaput was asked whether Christians are being persecuted in the United States. I think his response was a good one: “‘Persecuted’ is a big word,” he said, going on to say, “We’re not in Pakistan or North Korea. But it would be very unwise to ignore the implications of government coercion like the HHS mandate, or the misuse of the IRS, or political and judicial attacks on the nature of marriage.”<sup>43</sup> His language was not incendiary, yet it conveys that we have a real problem to deal with.

And that is what we have to do—to speak truth, but to do so aggressively but peacefully, if that conjunction makes sense. I think that means being willing to speak truth to both sides—being critical both to those who are insufficiently sensitive to religious freedom in the United States and to those who would turn this into a war between good and evil. I say that recognizing that there are some Christians who really believe this is a “war against evil,” who believe we are in the final stages of the war prophesied in the Book of Revelation. I think that is neither a correct, nor a particularly helpful way to characterize what is going on in the United States today.

I mentioned before the effect of language of persecution on the ability to find common ground. Much of our debates about issues of law and public policy are anything but meaningful debates. Rather, they are little more than shouting matches between extremely polarized positions—and not even shouting to each other, but shouting past each other. I sometimes wonder if either side is listening to the other.

Almost anytime I suggest criticism of the tactics of the extremists (on either side), I hear the equivalent of “he started it,” “she behaved badly first.” (I failed to find that excuse acceptable when uttered by my daughter when she was in grade school; it is even less acceptable in this context). I believe we need to get beyond that, to truly seek to find a way to move

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41. Moss, *supra* note 39, at 13, 257.

42. See Barbara Hollingsworth, *Archbishop: ‘The More That Gov’t Mandates Evil Actions, the More Likely Civil Disobedience Becomes’*, CNS NEWS (Feb. 14, 2014, 2:59 PM), <http://cnsnews.com/news/article/barbara-hollingsworth/archbishop-more-govt-mandates-evil-actions-more-likely-civil>.

43. *Id.*



debates forward by finding common ground. Language of persecution does not aid that effort.

V. FINAL POINT: ASSUMING THE LABEL PERSECUTION IS AN ACCURATE ONE, HOW SHOULD WE RESPOND TO THAT?

Let's assume the label persecution is the correct one; that the lack of respect, failure to affirm, failure to sufficiently accommodate, scorning, etc. are worthy of the label persecution. What should be our reaction?

First, should Christians be surprised at this? After all, the Incarnate God, in whose name we call ourselves Christians, was put to death for what he preached. God came into the world and preached a message antithetical to the power structure of his day, upsetting the way things had been done. And when that happens, the existing power structures do not play nice.

This is what we signed up for. It is not as though Jesus did not promise us that following him would lead to some unpopularity:

Remember the word I spoke to you, 'No slave is greater than his master.' If they persecuted me, they will also persecute you.<sup>44</sup>

Behold, I am sending you like sheep in the midst of wolves. . . . You will be hated by all because of my name.<sup>45</sup>

Before [the end], they will seize and persecute you, they will hand you over to the synagogues and to prisons, and they will have you led before kings and governors because of my name. . . . You will even be handed over by parents, brothers, relatives, and friends, and they will put some of you to death. You will be hated by all because of my name.<sup>46</sup>

From the beginning, Jesus was clear that walking with him was not a blissful walk in the park. That it was not going to be all turning water into wine at wedding feasts, healing the sick, and feeding the multitudes. That it was not all going to be pleasant.

David Steindl-Rast, a Benedictine monk, has a wonderful book on the creed, titled *Deeper than Words: Living the Apostles' Creed*. Speaking about the line in the creed in which we say that Jesus suffered under Pontius Pilate, he writes:

All those whose faith in God finds expression in their faith in Jesus Christ who suffered under Pontius Pilate must realize what they are in for. Citizens, for instance, who demonstrate against the use of torture by their government take the kind of stance that Jesus took. They commit themselves to speak up for justice

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44. *John* 15:20.

45. *Matthew* 10:16, 22.

46. *Luke* 21:12, 16–17.

and compassion and peace, as the Spirit guides them—like Jesus . . . .<sup>47</sup>

There is a cost to Christian discipleship. To be a Christian is to share in the Paschal Mystery. Dietrich Bonhoeffer wrote: “Just as Christ is Christ only in suffering and rejection, so also they are his disciples only in suffering and rejection, in being crucified along with Christ. Discipleship as commitment to the person of Jesus Christ places the disciple under the law of Christ, that is, under the cross.”<sup>48</sup>

More recently, Pope Francis preached a homily in March of this year in which he called persecution a “reality of Christian life,” saying that the Cross is always present when we follow Christ.<sup>49</sup>

So not being popular, not being respected, not having every accommodation we might like to have—whatever label we give that—is kind of built into our faith.

Second, Jesus is very clear how we are to react to such persecution:

Bless those who persecute you, bless and do not curse them.<sup>50</sup>

But I say to you, love your enemies, and pray for those who persecute you, that you may be children of your heavenly Father . . . .<sup>51</sup>

And part of how we are to react is to stand firm in the face of any persecution. That is the lesson of the parable of the mustard seed. We are not to be like:

The seed sown on rocky ground[—]the one who hears the word and receives it at once with joy. But he has no root and lasts only for a time. When some tribulation or persecution comes because of the word, he immediately falls away.<sup>52</sup>

Finally, Jesus reminds us that persecution is not simply some horrible thing we have to suffer, but something we should, if not welcome, at least recognize the blessing in, reminding us that the persecution is not the end of the story:

Blessed are they who are persecuted for the sake of righteousness, for theirs is the kingdom of heaven. Blessed are you when they insult you and persecute you and utter every kind of evil against you [falsely] because of me. Rejoice and be glad, for your

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47. DAVID STEINDL-RAST, *DEEPER THAN WORDS: LIVING THE APOSTLES’ CREED* 79 (2010).

48. DIETRICH BONHOEFFER, *MEDITATIONS ON THE CROSS* 12 (Douglas W. Stott trans., 1998) (1996).

49. See Elise HARRIS, *Pope: More Martyrs Exist Today than in the Early Church*, CATHOLIC NEWS AGENCY (Mar. 4, 2014, 2:56 PM), <http://www.catholicnewsagency.com/news/pope-more-martyrs-exist-today-than-in-the-early-church/>.

50. *Romans* 12:14.

51. *Matthew* 5:44–45.

52. *Id.* 13:20–21.

reward will be great in heaven. Thus they persecuted the prophets who were before you.<sup>53</sup>

You will be hated by all because of my name, but not a hair on your head will be destroyed. By your perseverance you will secure your lives.<sup>54</sup>

Now, to be clear, I am not saying Christians should not work to ensure just structures, or that Christians should not take advantage of the protections of our faith afforded by the First Amendment or the Religious Freedom Restoration Act.

But I am suggesting that there is something about the tone with which this issue of “persecution” is often addressed (whether or not that term is used) that seems to me inconsistent with Jesus’s preaching. (For that matter, the same is true even when the language employed is that of lack of religious freedom). Specifically, there is a sense of entitlement—as though we have the one true way and everyone ought to facilitate our living of it and spreading it to others.

As I have said, I do not think the term “persecution” is a good one to be tossing about. But if we as Christians are being persecuted, well, blessed are we.

Most importantly, whatever term we use, our response should be to continue to witness our truths—at whatever cost. If we believe in the power of our truths, we will, no matter how difficult, continue to be, to borrow a phrase, the “counter-cultural salt of the earth.”<sup>55</sup>

Thank you again for allowing me to be with you this afternoon.

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53. *Id.* 5:10–12.

54. *Luke* 21:17–19.

55. Andrew Sullivan, *Surrender Douthat!*, THE DISH (Mar. 4, 2014, 1:23 PM), <http://dish.andrewsullivan.com/2014/03/04/surrender-douthat/>.