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LISTENING FOR THE FUTURE IN THE VOICES OF THE PAST:

John T. Noonan, Jr. on
Love and Power in Human History

*M. Cathleen Kaveny**

I. INTRODUCTION

With the publication of *After Virtue* in 1981, Alasdair MacIntyre revolutionized the study of post-Enlightenment moral philosophy by insisting that it repent of its current pretensions to a view from eternity and confess its temporal roots in the long and motley history of human reflection about the good life.¹ Almost a quarter of a century earlier, John T. Noonan, Jr., a young Harvard-trained legal scholar who possessed a doctorate in philosophy from Catholic University, had waged a similar battle against the widespread misconception of the medieval concept of usury as monolithic, self-contained, and immutable.²

Working with medieval authors who were themselves largely insensitive to the idea of historicity, writing in the context of a pre-Vatican II Catholicism still imbued with the abstract and ahistorical spirit of nineteenth century neo-Thomism, Noonan demonstrated in his first book that the concept of usury was in fact a fusion of concrete theological, ethical, economic, and legal concerns which were not stagnant, but organically developing. In so doing, he gave Catholic Christianity a more adequate conception of its past. More than that, he gestured optimistically toward its future. Tracing how the absolute prohibition of usury, defined as any lending of money at interest, was circumscribed, attenuated, and finally abandoned by succeeding generations of moral theologians and canon lawyers, Noonan underscored that the Church could and did change its mind about important moral issues which were held to implicate unalterable strictures of the natural law. Revealing that an increased willingness on the part of moralists to acknowledge that moral experience of Christians professionally involved in the practices of commerce and banking had fueled the evolution of the

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

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

usury doctrine in past centuries, Noonan nourished the hope for a stronger voice of lay experience in ecclesial discussions of moral issues throughout the years to come.

Written during the Second Vatican Council (and before *Humanae Vitae*³ was issued), his second magisterial study, *Contraception*,⁴ incorporated and extended both of these insights. Since that time Noonan's work on such topics as the canon law of marriage,⁵ slavery,⁶ bribery,⁷ and religious liberty,⁸ has consistently embodied the conviction that moral teachings and religious doctrines must not be divorced from the historical and social context engendering them. Prodigious in learning as well as graceful and often witty in style, his books draw upon sources both ancient and modern, composed in several languages, and cutting across the disciplines of theology, philosophy, history and law.

My purpose in this review article is not primarily to distill into capsule form the conclusions Noonan reaches in each of his detailed tomes. Indeed, it would violate Noonan's own historical sensibilities to suggest that these conclusions can be wrenched without distortion from his discussion of the particular episodes which give them shape and substance. Metaphorically speaking, my aim is rather to look for a moment at the mirror itself rather than at the reflection placed before our gaze. In the conviction that they cannot fail to influence his perspective, and our perspective through his, I hope to highlight some of Noonan's own normative commitments regarding such fundamental issues as epistemology, theological anthropology, and the relation of love, justice, and law. I also hope to indicate several ways in which his work, bearing on the past, might offer some direction for present and future discussions in theological ethics.

3. Pope Paul VI *Humanae Vitae* 1968 in Joseph Gremillion, ed, *The Gospel of Peace and Justice* (Orbis Books, 1976).

4. John T. Noonan, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (expanded edition, Belknap Press of Harvard U Press, 1986).

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

6. John T. Noonan, Jr., *The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams* (U of California Press, 1977).

7. John T. Noonan, Jr., *Bribes* (Macmillan Publishing Co, 1984).

8. John T. Noonan, Jr., *The Believer and the Powers that Are: Cases, History, and Other Data Bearing on the Relation of Religion and Government* (Macmillan Publishing Co, 1987).

II. A MULTIFACETED HISTORICITY

A. An Epistemological Conviction

Why is it so important for Noonan to situate his moral analysis historically? First, as with MacIntyre, Noonan's stance presupposes an epistemological outlook. Knowledge in general, moral knowledge in particular, is both sought after and articulated in particular times and places. Over the years, Noonan's construal of what counts as adequately situating a moral concept or practice has consistently expanded. While interdisciplinary in character, his first book⁹ is best characterized as a history of ideas. Noonan's primary concern is to trace the development of the moral concept of usury through the treatises of the theologians and canonists who discuss it; his consideration of the actual social and economic circumstances in which the doctrine was forged and applied lacks detail and plays a subsidiary role.

*Contraception*¹⁰ expands the database of which Noonan takes account in at least two ways. First, he pays more attention to questions of a concrete nature: what sort of person practices contraception, under what social and familial circumstances, and by what means. Secondly, he sketches the polemical context in which the doctrine developed so as better to illuminate both its impetus and ultimate purpose. For example, it is only in light of Augustine's experience with the anti-procreative ethic of the Manichees that we can accurately grasp the saint's unwavering conviction that all contraceptive practices (including the "rhythm method") count as sinful violations of the primary procreative purpose of marriage.¹¹ However, notwithstanding its attention to social situation and political or doctrinal controversy, *Contraception*¹², like the usury book, is still best described as intellectual history. Noonan's fundamental stress still falls upon the development of doctrine. Despite their importance, the historical background and social context appear not as proper centers of attention in themselves, but as the indispensable prerequisites to proper understanding of moral ideas.

9. Noonan, *Usury* (cited in note 2).

10. Noonan, *Contraception* (cited in note 4).

11. *Id.* at 107-139.

12. *Id.*

By contrast, Noonan's next book, *The Power to Dissolve*¹³ reveals a marked shift in concern. Aptly subtitled "Lawyers and Marriages in the Courts of the Roman Curia," the book is not focused upon the development of canonical teachings about marriage and annulment, but more broadly upon the moral practices they foster and the living system of canon law in which they take their place. More specifically, Noonan refuses to separate the ideas and ideals of canon law from the way in which they were formulated by and applied to particular *human persons* in the context of human institutions. Consequently, the book is organized around six specific cases, annulment petitions brought before the Roman ecclesiastical courts between 1653 and 1923. Each case presents the Curia with the unavoidable task of ranking the priority of various commitments of the tradition which stand in mutual tension, such as between the theologically driven affirmation of the possibility of a valid, intentionally virginal marriage (as typified in the Catholic tradition by that of Mary and Joseph) and the more practically minded Augustinian view that persons contracting marriage must be open to the good of procreation.¹⁴ Following their often serpentine courses through different layers of ecclesiastical bureaucracy, Noonan shows how the final disposition of each case depends as much upon the individual quirks of the persons involved as upon more abstract and impersonal doctrinal exigencies.

Noonan's most recent massive historical studies, a treatise on bribery¹⁵ and a casebook with commentary on religious liberty¹⁶ manifest his increasing dexterity in reflecting the development of moral and legal movements through the prism of individual lives and choices. One might say that Noonan's insistence upon situating moral concepts not only in rough social context, but even more precisely within the lives of particular persons, bespeaks an epistemological commitment to historical specificity which surpasses even that of MacIntyre. Yet his commitment to such specificity is not merely epistemological. It is a necessary entailment of his theological anthropology, and the conception of human obligations to one and other which it generates.

13. Noonan, *The Power to Dissolve* (cited in note 5).

14. *Id.* at 80-122.

15. Noonan, *Bribes* (cited in note 7).

16. Noonan, *The Believer and the Powers that Are* (cited in note 8).

B. An Anthropological Conception

For Noonan, the study of ethics, law, and theology is an historical enterprise because the *persons* who engage in these activities are historical beings. Moreover, because human nature is essentially social, and human society also moves within time, those of us who are living today stand in community and conversation with the dead. The shape of our minds and hearts is informed by the ideas and purposes of our forebears much as the shape of our bodies is informed by their genetic material. We manifest our fidelity to the persons of the past not in slavish repetition of old formulas, but in sensitively attempting to discern the core purposes of traditional doctrine, and creatively applying it to a new situation. Such a process requires us both to understand and to judge our predecessors. In sifting through their thought we must separate insights of perduring value from the rough bundle of time-bound presuppositions and failures of will and vision which trap them. This demythologizing exercise is by no means easy, nor untouched by ambiguity. The best and most holy of persons can remain tragically constrained by their context. For example, while praising Pope Benedict XIV as a man “[of] intelligence seasoned by experience and joined to goodness,”¹⁷ Noonan also hints of the rigid order constricting the Pope’s mind by depicting his world in terms of the yearbook issued at that time by the Roman Curia. Concluding with a flourish his detailed and ironic catalog of the odd scraps of information contained in the yearbook, Noonan writes: “This hieratic structure on the horarium of Italy, which opened with the date of the creation of the world, continued with the dates of the creation of cardinals, and closed with the schedule of committee meetings of the Inquisition, was the universe of Prospero Lambertini, in which he lived, for which, perforce, he spoke as Pope.”¹⁸

Just as Noonan struggles against perceiving the past as a mythical golden age, so he resists the temptation to portray the great sins of our collective history as performed by monsters, not human beings. True, he does take poetic satisfaction in the fact that the mean-spirited Bishop of Beauvais responsible for condemning Joan of Arc to the stake bore the name “Pierre Cauchon” or “Peter Pig”¹⁹ and that the bribe-taking Roman praetor painted by Cicero

17. Noonan, *The Power to Dissolve* at 123 (cited in note 5).

18. *Id.* at 125.

19. Noonan, *The Believers and the Powers that Are* at 45-51 (cited in note 8).

as so foul, cruel, greedy, and lustful in his corruption that he bordered on the inhuman was known as "Verres" or "Hog."²⁰ Yet Noonan cautions that we can never know if the Hog of Cicero's account ever actually existed; Cicero, after all, was an expert orator charged with the role of prosecuting attorney, and his more colorful accusations should be interpreted accordingly.

In Noonan's accounts even fundamentally admirable persons appear as agents of banal and dishonorable behavior. Sir Francis Bacon was a taker of bribes, John Quincy Adams a giver of them. However, most wrongdoing, even in its more spectacular forms, is performed by persons whose character is an ordinary blend of good and evil. Samuel Pepys, one of Noonan's most intriguing and industrious practitioners of graft, acted as clerk to the British Naval Board in the mid-seventeenth century and "received from those interested in his official actions animals, clothing, food, furniture, silverware, cash and sex."²¹ Meticulously recording these transactions in his private journal, gleefully totaling his net worth on New Year's Eve 1664, and showering God with heartfelt praise for the increase, Pepys unwittingly furnishes posterity with incontrovertible evidence of his own greed, corruption, and lubriciousness.

Yet even while reprinting particularly damning excerpts from the journal, Noonan is at pains to prevent his readers from consigning Pepys to a moral realm too far removed from the one in which we locate ourselves. Pepys, "though he committed adultery, loved his wife," and "though he was in the pay of the Navy's suppliers and the king's contractors, loved the Navy and served the king."²² Evoking "the complexity of [Pepys'] conscience," Noonan traces the path of self-deception by which he quelled his inner misgivings. "Before his inner judge he customarily claimed to observe two rules: No one was hurt by what he took. What he got was voluntarily given."²³ Insisting that we recognize the ambiguity which characterized each human heart, Noonan forestalls our initial instinct to recoil against Pepys and his corruptions as repulsive, alien, and therefore irrelevant to us. Rather, we are absorbed by Pepys' rationalizations and are led to wonder under what circumstances we ourselves might have done the same thing. To acknowledge our continuing community with Pepys and others like him is

20. Noonan, *Bribes* at 46-54 (cited in note 7).

21. *Id.* at 375.

22. *Id.* at 387.

23. *Id.* at 382.

to give such persons their due in justice and in charity. No less significantly, it can also force us to exercise greater vigilance regarding the myriad ways in which self-deception goes hand in hand with sin in our own lives. Chronicling the histories of bribe-takers and bribe-givers, ecclesiastical bureaucrats long dead and American politicians still living, Noonan deftly traces a map of the pitfalls facing all of us who struggle to conduct our own lives with moral seriousness.

C. Moral Commitment

Noonan's focus on the lives and choices of individuals also implies an anthropology which resonates deeply with the Catholic personalism developed earlier in the twentieth century, and most strikingly with what David Hollenbach²⁴ calls the "personalist communitarianism" of Jacques Maritain.²⁵ For both Maritain and Noonan, each human person, gifted with both intelligence and will and possessed of "spiritual superexistence through knowledge and through love,"²⁶ demands the utmost respect in the arrangement of temporal matters. As Maritain puts it, every human being is "thus in some fashion a whole, not merely a part"²⁷ of a larger entity. Yet this does not mean that persons are atomistic, isolated individuals; Maritain goes on to say that "the person is a whole, but is not a closed whole, it is an *open* whole", blessedly open toward other persons for "communications of intelligence and love."²⁸ Persons, then, are essentially social, and created to live together in societies which are organized by the rule of law. Yet it also implies that the common good can be no straightforward utilitarian calculus which undercuts the sanctity of the individual persons constituting the community. The common good "is therefore common *to the whole and to the parts*, which are themselves wholes, since the very notion of *person* means totality; it is common to the whole and to the

24. David Hollenbach, *The Common Good Revisited* in 50 *Theological Studies* 70-94 (1989).

25. John T. Noonan, Jr., *Persons and Masks of the Law* (Farrar, Straus and Giroux, 1976). Noonan quotes a passage from Maritain's *Humanisme Intégral* (F. Aubier, 1936) on the interweaving of masks and roles in the frontispiece to *Persons and Masks of the Law*.

26. Jacques Maritain, *The Rights of Man and Natural Law* at 3 (Charles Scribner's Sons, 1943).

27. *Id.* at 3.

28. *Id.* at 5-6.

parts, over which it flows back and which must all benefit from it."²⁹

Every student of Christian ethics is familiar with the internal tensions which Maritain's personalist communitarianism engenders. Individuals are essentially and ultimately valuable, yet the exigencies of community organization often require impersonal rules, laws, and institutions which cannot afford to take into account the needs of particular persons. What, then, is the proper relationship between the personal love possible between individuals and the less personal justice necessary to order their lives together? Furthermore, how can either love or justice be borne within the abstract and sometimes rigid categories of law? Each human being is a unique creature of God, yet shares with other persons similar capacities and needs. In case of conflict, does love for other persons give priority to the unique aspects of individuals, or to their common human characteristics? Confounding in themselves, these questions are further obscured by the blot of human sin and failure upon individual and social life.

Much of John Noonan's work can be viewed as an attempt to investigate these tensions as they have arisen not only in ethical theory, but in real life. In *Persons and Masks of the Law*,³⁰ Noonan reflects "The central problem . . . of the legal enterprise is the relation of love to power. We can often apply force to those we do not see, but we cannot, I think, love them. Only in the response of person to person can Augustine's sublime fusion be achieved, in which justice is defined as 'love serving the one loved'."³¹ Like Maritain and other Thomists, Noonan believes that the power of law is necessary for social existence, not only to restrain wrongdoers, but to channel human energies toward cooperative relationships, and to teach the basic values of the society.³² Standing at the heart of any legal system are two entities: rules and persons. For Noonan, the legal "process is rightly understood only if rules and persons are seen as equally essential components, every rule depending on persons to frame, apply, and undergo it, every person using rules."³³ Grave moral dangers arise from letting go of either component. On the one hand, the abandonment of impartially for-

29. *Id.* at 8-9.

30. Noonan, *Persons and Masks* (cited in note 25).

31. *Id.* at xii.

32. *Id.* at 12-13.

33. *Id.* at 18.

mulated rules can produce “monsters” which strangle justice with favoritism. On the other, the subsumption of persons into the inexorable impersonality of rules can be ruthless.

Noonan’s book on bribery exhaustively probes the former problem: a bribe comprises “an inducement improperly influencing the performance of a public function meant to be gratuitously exercised.”³⁴ A bribe-taking judge prostitutes justice and tramples upon impartiality. In reproachful contrast to judicial graft and as the paradigmatic just judge, the God of *Deuteronomy* and of the apostle Paul eschews *prosopolempsia*—face-lifting or corrupt respect of persons.³⁵ Justice must be impartial. Acknowledging the necessity of the impersonal rules which give form to institutions serving purposes beyond the individual, and recognizing the need for human beings to participate in these institutions by playing socially defined roles, Noonan affirms such impartiality.

Yet in other writings, he stresses that at least as much damage has been inflicted throughout history by neglect of the individual persons interacting by necessity or by choice with the coercive power of the legal system. A major culprit is the use of rules to construct *masks*, or “ways of classifying individual human beings so that their humanity is hidden and disavowed.”³⁶ Playing on the ambiguity of the Latin term “*persona*,” Noonan explores several ways in which the American legal system has allowed masks (*personae*) to be used to conceal persons (*personae*) in both *Persons and Masks of the Law*³⁷ and *The Antelope*.³⁸

The latter provides a case study in one of the most deadly and efficient uses of legal terms to obscure humanity, the subsumption of enslaved Africans and their descendants under the category of “property.” The *Antelope* was a ship captured off the coast of Florida by American agents in 1820, with 281 Africans destined for the slave markets on board. At the time, it had been illegal for over ten years to import slaves anywhere within the United States, and the President had recently acquired power to assure the “safe-keeping, support and removal beyond the United States” of Africans taken on captured ships. Despite these facts, over 100 Africans from the *Antelope* died, many of neglect or mistreatment, and

34. Noonan, *Bribes* at xi (cited in note 7).

35. *Id.* at 61.

36. Noonan, *Persons and Masks* at 19 (cited in note 25).

37. *Id.*

38. Noonan, *The Antelope* (cited in note 6).

nearly 40 were enslaved. Only about 120 of them were finally deemed free persons, and were put on ships to Liberia seven years after their capture. In *The Antelope*³⁹, Noonan tells the tale of the political machinations, the bureaucratic ennui, the petty calculations, and the self-delusion which enabled, for instance, men like Judge William Davies and Justice William Johnson to “overcome” their personal revulsion against slavery long enough to uphold its legality under international law and decide that foreign slave traders should be allowed to recover their “property” in the courts of the United States.⁴⁰

According to Noonan, the masks which effect such moral catastrophes as that befalling the *Antelope* are of two kinds: those imposed on others, such as “property” in the case of slaves, and those imposed on oneself, such as “the court” and “the law” in the case of judges rendering opinions.⁴¹ Practically and morally, they are deeply interconnected: Practically, it is only by secreting their own human feeling under impersonal masks that such fundamentally decent persons as Holmes, Cardozo, Wythe, and Jefferson could bear to place such dehumanizing masks on the faces of those over whom they exercised power.⁴² Morally, to mask another is also to mask oneself. If for Noonan, as for Maritain, it is at the essence of personhood to relate with knowledge and love to other persons⁴³ then to treat another as less than human also denigrates one’s own humanity.

D. A Case Study

One crucial problem which Noonan’s writings raise without fully answering is how to differentiate between judicial attention to claimants that wrongfully “lifts up faces” and attention which pays rightful regard to the “particular flesh and blood and consciousness”⁴⁴ standing before the bench. For example, in the vast majority of cases, the comparative financial status of the litigants appears both immaterial to any legal dispute between them and irrelevant to their status as persons. Indeed, as Noonan emphasizes, to favor a particular petitioner because she is powerful and rich clearly

39. *Id.*

40. *Id.* at 51-68.

41. Noonan, *Persons and Masks* at 21 (cited in note 25).

42. *Id.*

43. For example, *id.* at 20 and 167.

44. *Id.* at 26.

seems to violate judicial impartiality. But what about giving special concern to the *poor*? Consider Noonan's assessment of Judge Benjamin Cardozo's decision in the most famous tort case of the twentieth century, *Palsgraf v Long Island Railroad*.⁴⁵ A forty-three year old mother doing janitorial work to support her three children, Helen Palsgraf was injured in a freak accident involving a railroad employee while waiting for a train to the beach. She sued the railroad for negligence. Cardozo not only denied her claim for damages, but ordered her to pay both her own and the railroad's court costs, a sum which would have amounted to more than her annual income and which the railroad could have collected by selling her personalty. Of Cardozo's imposition of costs, Noonan persuasively argues that "only a judge who did not see who was before him could have decreed such a result."⁴⁶ Under New York rules of practice, this was a matter of judicial discretion, and it is hard not to blame a judge who imposes costs upon a poor plaintiff bringing a good-faith, colorable claim against a rich corporate defendant. In fact, since the law explicitly gave Cardozo discretion in this matter, one could even argue that his decision to levy costs on Helen Palsgraf was as much failure in applying rules as it was blindness in assessing persons.

But Noonan does not address as forthrightly the question which presents the tension between respect for rules and regard for individual persons most acutely. Should Cardozo have taken account of Helen Palsgraf's poverty and the railroad's great wealth in actually deciding the case? More specifically, does Noonan's construal of respect for persons imply that in the last analysis, Helen Palsgraf should have won her lawsuit against the Long Island Railroad? He does not explicitly say, but hints that his answer would be in the affirmative.⁴⁷ Assuming for a moment that this is so, a more subtle question presents itself. Precisely why does respect for persons require her to win? Such respect could focus on two different aspects of Helen Palsgraf: the specific details of her life or the features of her existence which she possesses in common with many other persons. Noonan does not always distinguish between the two.

45. 166 NE 99 (1928); Noonan, *Persons and Masks* at 111-151 (cited in note 25).

46. *Id.* at 144.

47. This is not surprising, since Noonan does not conceive the purpose of *Persons and Masks of the Law* as second-guessing judges but as exploring the interaction between individuals, rules, and the legal system.

On the one hand, does Noonan think Cardozo should have given decisive weight to the *specific* difficulties of Helen Palsgraf's *particular* life, such as the fact that she was the sole support of her children and already worked two jobs? The considerable effort Noonan devotes to fleshing out impersonal law reports with the details about her background supports this position, as does his emphasis on the need for a love-informed justice which concentrates on the needs of concrete individuals. On the other hand, certain of his remarks suggest that giving Mrs. Palsgraf such special consideration would have been too automatically preferring *this* David over *this* Goliath.⁴⁸ Perhaps, then, respecting Mrs. Palsgraf as a person entails taking account not of the aspects of her life which are *specific* to her, but of the more *generalizable* fact of her poverty and lack of social power. If this had been Cardozo's approach, he would have focused not on the actual troubles of Mrs. Palsgraf, but on the more general social problems embodied in them. This is not a moot point in our common law system where judges make law, and where the opinions of those sitting on higher courts have precedential weight. His position of power gave Cardozo both the freedom and the responsibility of shaping social policy through the legal framework he developed in deciding this case. For example, Cardozo could have decided that the railroad had an obligation to pay damages to persons like Helen Palsgraf, since it could easily treat the amount as an operating cost which could be distributed among all its passengers through slightly higher ticket prices. That way, no one customer would be forced to bear the entire brunt of an unfortunate accident.

Noonan may well believe that respecting Mrs. Palsgraf as a person means taking account of the generalizable features of her situation, such as her poverty and social powerlessness. Criticizing Cardozo's failure to address the issues of social justice raised by the case, he locates its source in Cardozo's inability to see the *persons* standing before his bench.⁴⁹ But to adopt this construal of responsibility towards persons would begin to blur the distinction between respect for persons and regard for impersonal rules that Noonan wants to maintain. As the preceding paragraph of this essay demonstrates, to talk about precedent and the more generalizable features of persons' lives is to begin to talk about *rules* again,

48. *Id.* at 138.

49. *Id.* at 137-139 (emphasis mine).

albeit fairly specific ones. If the objection to Cardozo's opinion is not so much that he failed to attend to Mrs. Palsgraf's particular troubles but to the more general feature of her social status, why not say that Cardozo articulated the *rule* of tort law in an unjust fashion?

While Noonan does not provide a method for elucidating the knotty problems discussed above in *Persons and Masks of the Law*,⁵⁰ one can read him as recommending a *model* of sorts in *Bribes*.⁵¹ Suggesting that the Western viewpoint on bribery has been profoundly influenced by its dominant religious traditions, he points to a paradox historically abiding at the very heart of Christianity: the simultaneous merciful favor and just judgment of God, who in Jesus Christ, both condemned our sin and brought us back from its penalty. Noonan writes:

Only a consciousness committed to the mystery of Christian particularism—that God chose this people, this virgin, these apostles, these converts, this Church—could have insisted so fiercely that God acts gratuitously. Only a consciousness committed to the requirements of an impartial judge could have felt so keenly the force of the cry that God is a just Judge. Only the mystery that the Judge is also the Repurchaser, the Redeemer, the Giver of himself could have made beliefs in impartiality and in favor bearable.⁵²

Assuming that Noonan affirms the christology just described, what light can be shed on the tensions within his version of personalist communitarianism? I offer three observations, all of which flow much from my sense that Noonan conceives Christian ethics as fundamentally a matter of *imitatio Christi*.⁵³ First, since the relation between Christ's power as impersonal judge and his personal love as savior is ultimately a theological mystery, we cannot expect to work out its ethical implications in a fully systematic way. Secondly, we can, however, note that when God's impartiality is set aside in the Bible, it is set aside on behalf of the weak. "God is just, impartial, and simultaneously championing the cause of the underdog."⁵⁴ This implies that in the process of making social rules, which necessarily involves classifying persons in general terms, we should grant a *prime facie* legitimacy to categories

50. Noonan, *Persons and Masks* (cited in note 25).

51. Noonan, *Bribes* (cited in note 7).

52. *Id.* at 82.

53. Noonan, *Bribes* at 65, 67 (cited in note 7).

54. *Id.* at 16.

designed to protect the poor and socially vulnerable. Human persons have an ultimate reality that human rules do not. So does human pain. The sight of it should force a judge at least to reconsider the adequacy of the categories used by any given rule to classify persons. Thirdly and finally, divine mercy and judgment are ultimately focused on each person in all her individuality.⁵⁵ This intimates that no matter how sensitive a rule or category might be to general features of human need, earthly judges can never afford to ignore the particularity of the person standing before them. In the end, if a judge must err, it is better to do so in favor of the person rather than the rule. Equity trumps law.

III. CREATIVITY, NOT MAGIC: SOME THOUGHTS ON NOONAN AND CONTEMPORARY MORAL THEOLOGY

While discussing the credibility of the canonical practice of granting annulments, Noonan draws an intriguing distinction between creativity and magic in the development of doctrine.

Magic, the whisking away of difficulties by a nod, the replacement of reality by illusion, is, however, but one step from creativity, the transformation of a situation by energetic innovation. Like magic, creativity connotes spontaneity and freedom from iron law, but it also implies labor and increase by organic development.⁵⁶

Noonan's distinction, of course, applies as much to moral theology as it does to canon law. In what follows, I would like to explore three areas in which his work might help contemporary Catholic moral theology turn toward creativity and away from magic as it faces the challenges of the Post-Vatican II Church.

A. Enduring Concerns of the Gospel

The year 1991 marked the centennial of Pope Leo XIII's encyclical *Rerum Novarum*, widely lauded as inaugurating modern Roman Catholic social teaching decisively proclaimed by the Second Vatican Council's pastoral constitution on the church and the modern world, *Gaudium et Spes*.⁵⁷ Examining the substantial body of scholarly literature on social justice which has grown up since

55. *Id.* at 217.

56. Noonan, *The Power to Dissolve* at xvii (cited in note 5).

57. Vatican II, *Gaudium et Spes: Pastoral Constitution on the Church in the Modern World* (1965), in Joseph Gremillion, ed, *The Gospel of Peace and Justice* (Orbis Books, 1976).

Vatican II, an unwary reader might conclude that the Catholic tradition was uninterested in such issues before the late nineteenth century. John Noonan's work on usury demonstrates that such a conclusion would be erroneous. While the prohibition of usury, taken most stringently to mean all lending money at interest, was greatly tempered over the centuries, its stable (although often unrecognized) core were the "desires to prevent exploitation of the poor and to discourage reckless profit."⁵⁸

The object of considerable attention on the part of theologians, canonists, prelates and businessmen between the twelfth and eighteenth centuries, the Church's teaching on usury has all but been forgotten (except perhaps as an example of the Church's ability to change its mind about moral issues).⁵⁹ No allusions to usury appear in many important contemporary works on social justice⁶⁰ or recent histories of moral theology.⁶¹ Their authors do not claim, of course, that no theoretical or practical interest in questions of social justice existed between the biblical or patristic eras and the time of Leo XIII. They have simply delimited their topic in such a way that the medieval discussion of usury falls outside of it.

I would like to suggest, however, that reintegrating this aspect of scholastic thought into contemporary scholarly consciousness could alleviate an unhelpful competition which J.A. DiNoia argues has arisen between the twin aims of the Second Vatican Council, *aggiornamento* (modernization) and *ressourcement* (historical retrieval). According to DiNoia, the American tendency to give unqualified priority to *aggiornamento* unfortunately resulted in a conception of Vatican II as "representing a sharp break" with previous centuries, particularly the scholastic era, and thus undercut the impetus for retrieving the panoply of riches in the tradition.⁶² DiNoia's own thesis can be expressed with the maxim "*Ressource-*

58. Noonan, *Usury* at 170 (cited in note 2).

59. See John T. Noonan, Jr., *Development in Moral Doctrine* 54 *Theological Studies* 662-77 (1993).

60. See, for example, Gremillion, ed, *Introduction to The Gospel of Peace and Justice* (cited in note 57); John C. Haughey, ed, *The Faith that Does Justice: Examining the Christian Sources for Social Change* (Paulist Press, 1977); David Hollenbach, *Claims in Conflict: Retrieving and Renewing the Catholic Human Rights Tradition* (Paulist Press, 1979).

61. See, for example, John Mahoney, *The Making of Moral Theology: A Study of the Roman Catholic Tradition* (Clarendon Press, 1987); John A. Gallagher, *Time Past, Time Future: An Historical Study of Catholic Moral Theology* (Paulist Press, 1990).

62. J.A. DiNoia, *American Catholic Theology at Century's End: Postconciliar, Postmodern, Post-Thomistic* 54 *The Thomist* 499, 503 (1990).

ment without *aggiornamento* is empty. *Aggiornamento* without *resourcement* is blind.”

Noonan's work on usury illuminates ways in which the fruits of *resourcement* and *aggiornamento* can be complimentary. For example, Noonan calls the scholastic analysis of usury “the only detailed and comprehensive philosophical effort in history to explore the requirements of justice in the credit operations central to commercial life.”⁶³ The early tradition's crucial shift from interpreting usury as a sin of uncharity or avarice to viewing it as a species of injustice⁶⁴ bears the same moral claim as the U.S. Bishops' demand for a restructuring of international banking practices to improve the lot of Third World countries.⁶⁵ The later scholastic tradition's efforts to circumscribe the absolute prohibition against usury in light of the experience of Christian merchants in Europe exhibits a common kernel of insight with the emphasis of liberation theologians upon the unity of theory and practice in the struggle for justice in South America. Of course, the historical and political contexts of these theological and ethical reflections diverge dramatically. So do the philosophical tools they employ. But even as Catholic Christians affirm the necessity for those living in different times and places to respond to the Gospel with their own “freshness,” the same Spirit calls us into the “continuity” of eternal community with one another through Christ.⁶⁶ Supporting that belief, John Noonan's work can foster the discernment of new patterns of unity and difference in the Catholic tradition.

B. A Distinctively Legal Argument

John Noonan concludes his 1965 edition of *Contraception* with an optimistic note about the possibility of change in the Church's prohibition against artificial methods of birth control.⁶⁷ Having demonstrated in the volume that at the center of ecclesiastical teaching were the “values of procreation, education, life, personality and love,” he argues that “About these values a wall had been built; the wall could be removed when it became a prison rather

63. Noonan, *Usury* at 7 (cited in note 2).

64. *Id.* at 14.

65. National Council of Catholic Bishops, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* at ¶¶ 261-293 (United States Catholic Conference, 1986).

66. Compare Gustavo Gutiérrez, *A Theology of Liberation* at xlv (Orbis Books, 1988).

67. John T. Noonan, Jr., *Contraception* (cited in note 4).

than a bulwark."⁶⁸ Issued three years after Noonan's book was published, the papal encyclical *Humanae Vitae*⁶⁹ did not remove the wall. Noonan's reaction to the encyclical is contained in an article entitled "Natural Law, the Teaching of the Church and the Regulation of the Rhythm of Human Fecundity," which has been appended to the second edition of *Contraception*.⁷⁰

In this polarized climate where the only acceptable options are either "dissent" or "assent" to magisterial teaching on contraception, Noonan's response provoked puzzlement from both sides.⁷¹ On the one hand, Noonan begins with the claim that "the time for debate over doctrine itself is past . . . The time now is to understand the encyclical and to answer questions within its framework."⁷² Those who oppose *Humanae Vitae* could fear that Noonan is abandoning the fruits of his intellectually groundbreaking and liberating work in favor of submission to the magisterium. On the other hand, the practical import of the appended article is that contraceptive practices must be avoided only a small portion of every month. Those who support *Humanae Vitae* could see this as an attempt to evade the strictures set down by the Pope.

How, then, should Noonan's appendix be perceived? Is it "dissent from" or "assent to" magisterial teaching? It is neither, and it is both—at least according to the way these terms are commonly understood. The article exemplifies a distinctively legal mode of reasoning which fruitfully transcends the rigidity of both categories. First published in the *American Journal of Jurisprudence*⁷³ in 1980, it reads like the brief of a lawyer whose argument is circumscribed but not ultimately undone by the existence of an authoritative and possibly opposing decision written by an eminent judge. Without questioning the authority of *Humanae Vitae*,⁷⁴ Noonan interprets it in such a fashion that the bulk of his book's argument survives intact.

Consider his strategy. First, having announced his good faith in attempting to work within the confines of the encyclical, he fore-

68. Id at 533.

69. Pope Paul VI, *Humanae Vitae* (cited in note 3).

70. Noonan, *Contraception* (cited in note 4).

71. See Lisa S. Cahill, *Catholic Sexual Ethics and the Dignity of the Person: A Double Message*, 50 *Theological Studies* 120, 135-137 (1989).

72. Noonan, *Contraception* at 535 (cited in note 4).

73. John T. Noonan, Jr., *Natural Law, the Teaching of the Church and the Regulation of the Rhythm of Human Fecundity*, 24 *Am J Juris* 16 (1980).

74. Pope Paul VI, *Humane Vitae* (cited in note 3).

stalls any attempt to interpret it in light of the purposes of those opposed to the Second Vatican Council. He insists that *Humanae Vitae*⁷⁵ be read together with *Gaudium et Spes*.⁷⁶ Secondly, he stresses the considerable development of doctrine which was ratified by the encyclical and supported by his own historical study: personalism, the expression of conjugal love as a purpose of marital intercourse, and the duty of married couples to make a responsible judgment about the proper size of their families. Finally, under the heading "Clarifications" of doctrine, Noonan considers three case studies designed to test the flexibility within the boundaries of *Humanae Vitae*. In the third, noting that "nature" implies "normalcy" in Catholic thought, Noonan suggests that the strictures of the encyclical do not prevent a married couple from using contraceptives on all but the prudently estimated four days each month when it is normally probable for intercourse to lead to procreation. After considering possible arguments against his position, Noonan concludes by noting that "it is scarcely an objection that the scope of a law should be narrow. In general, Christians have been called to liberty Do we worship God less because we are called to worship him formally only one day in seven?"⁷⁷

Thus in the appendix, Noonan offers a vision of *Humanae Vitae* which is continuous in essence if not in all details with the developing personalist values he highlights in the main body of *Contraception*.⁷⁸ Moreover, his interpretation of the encyclical could facilitate the choice of any future pope to lift its prohibitions by enabling that choice to be viewed as a further development of doctrine rather than as a reversal of it. These observations should satisfy those tempted to charge him with capitulating to magisterial pressures.

What of the opposite criticism, that he does not show sufficient "obsequium" for the teaching authority of the Church? First, the attention and intellectual energy which Noonan expends upon the encyclical testifies to the respect in which he holds it. His painstaking efforts to trace the encyclical's argument and its implications appropriately evoke the root word of *obsequium* (*sequor*, "to follow"). And secondly, Noonan's response to *Humanae Vitae* has precedent within the tradition; it echoes, for example, some of the

75. Id.

76. Vatican II, *Gaudium et Spes* (cited in note 57).

77. Noonan, *Contraception* at 554 (cited in note 4).

78. Id.

interaction between the magisterium and the theologians regarding the doctrine on usury. Of these earlier attempts to interpret papal pronouncements narrowly, Noonan writes "If the legislator allows a legalistic and close interpretation of his law, it is scarcely the part of others to challenge his liberality; and in such a case, it is not discreditable for an interpreter of the law to insist that it not be extended beyond the cases it formally proscribes."⁷⁹ Finally, the larger purposes in light of which Noonan interprets the encyclical are not alien to it, but are drawn from its very core.

While it would be fruitful to explore in detail the ways in which Noonan's mode of argumentation differs from more common approaches in Christian ethics, I have space here only to highlight two of the more distinctive features of legal argument. First and foremost, legal argument is *advocacy*, not only of a particular conclusion or result, but of a certain way of viewing the world which supports and surrounds it. Thus the form of the best arguments at law is not a disinterested attempt to balance the data yielded by discretely treated scholarly or legal sources. This is not to say that attention to crucial materials need not be incorporated into the argument; it is merely to note that admitting they must be accounted for tells nothing about the mode of their presence. A dissection can inform us that the human body is composed of given percentages of various elements. That does not mean we can mechanically mix those elements together and obtain life. Analogously, a truly excellent legal brief does not merely compile evidence, but proposes a vision of reality (or at least that portion of reality which is in dispute) that is more complete and compelling than the vision offered by the opposition. It is an exercise in aesthetics as much as in organization, a task for rhetoric no less than for logic.⁸⁰

Second, the fact that legal argument is oriented toward achieving a certain practical result for one's client means that the way lawyers approach authoritative sources differs from that of many scholars. For example, when confronted with an authoritative ecclesiastical pronouncement, many academic ethicists would see their task as two-fold. First, they would strive to pin down its meaning as objectively and precisely as possible, and secondly, they would attempt to *respond* to that clearly fixed interpretation of the

79. Noonan, *Usury* at 200 (cited in note 2).

80. For a helpful discussion of legal argument, see James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (U of Wisconsin Press, 1985).

pronouncement. By contrast, the dominant question for a lawyer is not what *to say* to a controlling opinion, but what *to do* with it. In her efforts, the lawyer does not merely respond to a fixed and predetermined construal of the opinion, but actually helps shape its interpretation. The opinion, itself one word in the continuing conversation of law, provides the raw material and the framework which enable the lawyer to exercise both creativity and judgment in proposing the next word. Some purposes are emphasized, some phrasing borrowed; other elements are downplayed or marginalized. Thus the authority of the opinion is not a command for deference imposed upon the lawyer's mind like an extrinsic force. Rather the opinion's authority lies in the fact that it becomes intrinsically incorporated into the lawyer's thought processes, reciprocally influencing and influenced by them.

Taken together, these points suggest that what Noonan does in his appendix is advocate a way in which *Humanae Vitae* can be better incorporated into the vision of the Church described in *Contraception* than into that proposed by those who oppose development of doctrine in the area of marriage and birth control. Rather than slaying the tiger, he tames it. Particularly in these times of great tension between the Vatican and American Catholicism, Noonan's lawyerly approach may suggest new tacks to Catholic theologians striving for faithful creativity within their tradition.

C. Abortion and Development of Doctrine

For over twenty years now, John Noonan has been a forceful participant in the difficult and divisive contemporary debate about abortion⁸¹ From his perspective, advocacy of a pro-life position is profoundly consistent with the moral lessons of history explored in his other writings; he sees the attitude toward the unborn entailed by most pro-choice stances as yet another example of the dehumanizing masks which human persons are capable of throwing over one another's countenances. Needless to say, Noonan's pro-life writings have provoked vigorous disagreement. While I will not rehearse the familiar shape of the abortion debate here, I would like to highlight one criticism which is particularly telling in Noonan's own terms. Feminist ethicist Beverly Wildung Harrison ob-

81. For example, see John T. Noonan, Jr., *The Morality of Abortion: Legal and Historical Perspectives* "Introduction" and "An Almost Absolute Value in History" (Harvard U Press, 1970); John T. Noonan, Jr., *A Private Choice: Abortion in America in the Seventies* (The Free Press, 1979).

jects that in *A Private Choice*,⁸² his only book-length work on abortion, Noonan frequently refers to the pregnant woman by the equivalent Latin term "*gravida*."⁸³ In effect, she charges Noonan with employing depersonalizing masks of his own, masks which conceal the pained faces of women confronting crisis pregnancies under the weight of an imposing Latin term.

Despite their many deep and intractable disagreements, Noonan should be able to affirm wholeheartedly that part of Harrison's agenda which is expressed in the dedication of her book in gratitude "for the *particularity* of women's lives"⁸⁴ (emphasis mine). Noonan's great strength as an ethicist has always been his refusal to turn a blind eye to the complexities and ambiguities moral obligations generate as they are instantiated in the lives of actual human beings. Showing us time and again that the moral life is rarely the easiest life, he does not often ignore the human tragedy which that fact can involve. It is thus even more unfortunate that in some respects his writings on abortion have a curiously abstract quality about them. Concentrating upon re-personalizing the *unborn*, Noonan does not attend as closely as he might to the difficulties facing *female* persons with problem pregnancies, nor to the tragedy that in our society those most likely to pay the cost of acting morally with regard to unborn life are those least able to afford it.

Noonan's other writings suggest a way for him to overcome this deficiency. He could write a book on abortion which is structured in terms of the "case" method of moral analysis he employs so effectively in *The Power to Dissolve*⁸⁵ and most of his later works.⁸⁶ This is not to say that if Noonan viewed abortion through the prism of individual lives and choices he would change his mind about its ultimate moral status. He might, however, convey a deeper and ultimately more persuasive sense of the true dimensions of the difficulties which can surround the demand for it.

Yet if Noonan were to decide to write such a book in the 1990s, the contemporary situation regarding abortion might force

82. Noonan, *A Private Choice* (cited in note 81).

83. Beverly Wildung Harrison, *Our Right to Choose: Toward a New Ethic of Abortion* at 267 n 25 (Orbis Books, 1983).

84. Id at "Dedication Page," (emphasis mine).

85. Noonan, *The Power to Dissolve* (cited in note 5).

86. Noonan, *Persons and Masks of the Law* (cited in note 30); Noonan, *The Antelope* (cited in note 6); Noonan, *Bribes* (cited in note 7); Noonan, *The Believer and the Powers that Are* (cited in note 8).

him to make hard methodological and substantive theological choices he has not yet had to face. Noonan's writings reflect not only a notion of development of doctrine within the Church, but a conception of the relation between Church and World that resonates deeply with the teachings of the Second Vatican Council and its theological progenitors (for example, John Henry Newman, Karl Rahner, John Courtney Murray). Humanity has moved from a static to an evolutionary conception of its own history⁸⁷ that exemplifies the promise of real moral progress. The development of the Church is not isolated, but intimately related to this promise. "The Church holds that in [Christ] can be found the key, the focal point, the goal, of human history."⁸⁸

Accordingly, Noonan's confidence in the development of Church teaching on such issues as usury and marital sexuality is matched by a similar belief in the positive moral trajectory of the secular world regarding such matters as slavery and bribery. On the whole, neither realm can be said to lead consistently or to follow slowly behind; Noonan highlights the interweaving of secular and religious motives on the sometimes tortuous path of moral growth. This close and ultimately harmonious relation between the developing moral vision of the Church and true human wisdom has allowed Noonan to remain fruitfully ambiguous about the ultimate epistemological warrants in the natural law ethics espoused by the Catholic tradition. He succinctly summarized the two basic options in his first book:

On the one hand, any act prohibited by the Christian tradition could be treated as if it were evil by nature, not by positive law.

On the other hand, any act not naturally demonstrable as evil could be considered as not prohibited by Christian teaching.⁸⁹

As long as Noonan perceives there to be no ultimate conflict between the best insights of humanity and those of the Church, he does not have to make any choice, but can allow the insights developed in the two realms to play off each other in the history of moral development.

Yet the protracted nature of the abortion debate may render such a strategy more difficult to maintain. Assume, as seems likely, that the Church's teaching will remain strongly pro-life, while the broader secular consensus settles firmly around a coherent and rig-

87. Compare Vatican II *Guadium et Spes* § 5 (cited in note 57).

88. *Id.* at § 10.

89. Noonan, *Usury* at 27 (cited in note 2).

orous pro-choice perspective that in all good faith cannot acknowledge the personhood of the unborn. From Noonan's perspective such a situation begins to call into question the compatibility of moral reasoning from a humanistic perspective and that done from the vantage of the Roman Catholic tradition. Moreover, it threatens the perception of an evolution of moral sensibility in both realms. What are his possible responses to these pressures?

On the one hand, Noonan could attempt to preserve the ultimate compatibility of the insights of the Church with those of the wider world by taking a longer and more complicated view of moral development. This could be done in two ways. The less likely course would be for Noonan to rethink his position on abortion. Concluding that the broad secular consensus and the not inconsiderable opinion of Christians like Beverly Harrison had the better viewpoint, he could trust that the Church would also revise its own opinion in time. In effect, this would be to assimilate the abortion issue to his views on usury and contraception. More likely, however, would be for Noonan to contend that the Church's perspective on unborn life will ultimately prevail in the wider society, although it may take a very long time. Moral development does not preclude human choice. At times, as in the case of the secular attitude toward abortion, such choices can be tragically wrong, thereby greatly hindering but not ultimately destroying the possibility for growth in moral insight. Thus Noonan could maintain the hope for long-term moral improvement in the case of abortion much as in the case of racial equality. However, while this hope might have been credible in the 1970's, when Noonan wrote his abortion books, it will become increasingly less so if time passes without any sign of a shift in moral sensibilities.

On the other hand, Noonan could take a much more radical methodological route. He could give up the possibility of ultimate and developing concordance between the best deliverances of faith and those of secular reason on the abortion question, and by implication, on a whole host of other issues. He could acknowledge that as the post-Christian, post-modern era wears on, the residual effects of Constantinean Christian morality on the wider culture will wear thin. Taking this approach immediately implicates matters at the forefront of contemporary theology. Questions of ecclesiology present themselves. Will the Church in a post-Christian era inevitably be sectarian? Does sectarianism imply separatism? So do problems in the theology of history. If we give up the notion of a

positively evolving human morality, can we still maintain the notion of development of doctrine within the Church? Is not that notion, particularly as explicated in the Second Vatican Council, intimately connected with making the light of Christ ever more visible to the nations? Finally, issues at the heart of moral theology must be faced, particularly those implicating the traditional Catholic commitment to a natural law approach. As noted above it is theoretically possible to maintain that the strictures of natural law ethic are *ontologically* valid for all human beings while simultaneously asserting that only a small portion of humanity (i.e., Christians) have significant *epistemological* access to it. Yet practically speaking, does not such a stance retain only the shell of a natural law approach, while abandoning its central purposes and advantages? If Catholic thought must leave behind its natural law tradition, would it be better to do so more forthrightly? Moreover, with what should it be replaced?

These are large questions, much easier raised than answered. They also seem quite far afield from the issue with which we started this section, the much narrower topic of Noonan's writings on abortion. Yet if abortion is in fact a moral crisis for contemporary Christianity as well as for the wider community, its ultimate resolution will not leave fundamental substantive and methodological commitments untouched. If Noonan's histories teach us anything, it is that a true moral crisis inevitably brings theological, ethical, political, and legal changes in its wake.

IV. CONCLUSION

Since December, 1985, John Noonan has been a judge on the Ninth Circuit Court of Appeals, which sits in San Francisco. During this time, he has combined his duties on the bench with continued activity as a teacher, writer, and scholar. While the nature of his responsibilities has shifted in his move from the academy to the judiciary, his concern for the effect of law on the lives of particular persons abides. Some of the issues which he has addressed as a judge could easily provide raw material for his books: whether Bette Midler can protect the distinctive sound of her voice from commercial exploitation,⁹⁰ whether Robert Alton Harris has the right to competent psychiatric advice before being sentenced to

90. She can. *Midler v Ford Motor Company* 849 F2d 460, (US Ct App, 9th Cir 1988).

death,⁹¹ and whether in order to gain political asylum, Olimpia Lazo-Majano must prove a clear probability of arrest or torture if sent back to El Salvador.⁹² Yet if anyone would recognize the crucial difference between his two vocations, it would be Noonan himself. The scholar's work ends with disciplined reflection on the complexity of the situation in which the litigants have found themselves. The judge must go on to decide their fate.⁹³

91. Noonan believed that he does, but the majority disagreed. *Harris v Vasquez* 913 F2d 606, (US Ct App 9th Cir 1990).

92. No; she merely has to prove a well-founded fear of persecution. *Lazo-Marjano v Immigration & Naturalization Service* 813 F2d 1432 (US Ct App 9th Cir 1987).

93. An abridged version of this article was published in 18 *Religious Studies* 112-17 (1992).

