

A RESPONSE (II) TO DOCTOR NOONAN

In response to John T. Noonan's variegated and suggestive paper one is pressed to be selective. My selectivity comes to rest on three large topics which were touched upon by Professor Noonan and one topic I see as necessary for the humanization of church law. I will speak to the following: 1) the dehumanizing influence of church law; 2) the "metaphor-making capacities of law"; 3) the problem of the amoral agent; and finally 4) I will suggest that the traditional debate between law and Gospel is seriously misplaced.

1) If one would speak of the humanization of man through the medium of church law, it is well to admit with John Noonan that the historical record of church law in this regard is not uniformly edifying. This admission need not be belabored, of course, but it is an honest and chastening prelude to more positive speculation about the humanizing possibilities of church law.

Noonan notes that slavery in the Western world "owed its beginnings to the men of Spain, Portugal, France, the Netherlands, and England, all nations molded by Christian thought." He notes that the failure of church lawyers and theologians here "left open gulfs of dehumanization into which European civilization plunged, in which American civilization foundered." This grim and incontestable observation should serve as a stark reminder that the errors in areas of moral value are not just unfortunate; they tend to be lethal.

By way of comment, one could add here to Noonan's specific example of slavery, three more generic problems that must be faced if church law would serve the humanizing capacities of men and women.

a) The most basic fault in church law as we have known it is that it is not notably informed by a specifically Christian ethic. If the Church is a specifically distinct society, it should be so because it embodies the specifying qualities of Christian existence. In the phrase of the Acts of the Apostles, it should in its perceptible form

be "the Way." In the hopeful term of Ignatius of Antioch, it should be describable as "the Agape."

By saying that our law should be the expression of Christianness, there is no suggestion that the Gospel yields a code or a methodology for the structuring of law. It does not. Indeed, it was partly for this reason that the Church in high moments of juridicization repaired to the given codes and structures of Roman law . . . to the point where it could be truistically said *ecclesia viget lege Romana*.

The Church should, of course, have availed itself of the helpful legal achievements of the Romans. It should not, however, have accepted so facilely the mindset and presuppositions of the civil lawyers. The Christian creed should still have been discernible within the Christian code. More bluntly, the code should have represented more of what Jesus represented and less of what he rejected.

Ivan Illich tells the story of his experience when he was called to the Vatican to give an accounting of his stewardship. Throughout the interrogation, Dr. Illich made repeated reference to canon law. At one point he was chided by an old friend on the interrogating board who suggested that Illich had never really believed in the code. Illich replied, resourcefully, that the Church had never asked us to believe in canon law . . . only to practice it. The truth in Illich's rejoinder is that the code did not in fact mirror the elements of Christianity to which faith is directed by grace.

b) A second problem of law is that all law is sacralizing, but especially church law. (Note the unhappy practice of referring to the "sacred canons.") Insensitive absolutism and inflexibility are the offspring of sacralized law. Before the sacral, obeisance seems more in order than creative response. Thus, when law is sacralized, it will not bend when new needs and new insights require adjustment.

c) A third problem that confronts all law in Church or State is the tendency of legal systems intent as they are on stability, to prefer stability to process even if stability is unjust. This inherent tendency of all law is enhanced and encouraged in church law by some deviant forms of theology, which lead to an unfruitful and self-defeating conservatism. My reference is to the deviation of an excessively futurist eschatology and to a realized eschatology of the Constantinian-Theodosian kind. A futurist eschatology posits the

cure of all ills in some future definitive act of God. In the meantime, from this viewpoint, it would make sense to dicker within the tragic confines of the *status quo* instead of straining creatively and courageously to taste the first fruits of the kingdom now. This theological stance allows for too much patience with the present conditions and would undergird the tendency of law to favor the stabilizing forces of society over against the potentially destabilizing forces of progress and correction. A futurist eschatology promotes the belief that we are locked into the limits of the present. It misses the fact that the future breaks in upon us if we would look at the horizons revealed by the Gospel light and follow the lead of the beckoning Spirit. Law is all too ready to freeze its view of the present as given and a futurist eschatology gives it unneeded support.

On the other hand, Constantinian eschatology was too inclined to interpret the *status quo* of imperial favor as the mark of the eschaton achieved. The shift from persecution to preferment was interpreted in terms of final blessedness, and straining toward the coming eschaton gave way to a premature sense of completion. Eusebius and Lactantius (the original White House preachers) led the chorus of contentment. The words of Psalm 97 were used to give voice to the new mood: "Sing to the Lord a new canticle, for he has done wondrous things!" The Constantinian eschatological mood, which melted the tension of "not yet" into the passivity of "already," was a cataclysmic ecclesiological event which infected both law and theology with the still lingering heretical assumption that the way things are is worthy of the Lord. Church law that was truly Christian in its moorings and intentionality would reflect Christian uneasiness with the *status quo* in which God is by no means "all in all." Church law and theology would take a step closer to Christ if they turned from Eusebius to Amos and proclaimed: "Woe to those who are at ease in Sion!" (6:1). Christianity that is true to itself is inherently liberal and is not free to marry the *Zeitgeist* or succumb to the limits of the *status quo*.

Christians have learned from civil lawyers throughout history. What Christian lawyers could now teach the civil lawyers is that a human and just society must involve not only *archy* but also a degree of constructive and corrective *anarchy*. Christian theology describes

man's spirit in terms of its openness to transcendence. Ossified and frozen legal structures that do not allow for growth but rather stifle the self-transcending dynamism of man and his society are immoral and inhuman.

It is widely presumed that in civil or ecclesial societies, dissent and disobedience are aberrations and that those who indulge in these activities must be prepared to receive due punishment. Rather, I believe that it follows from the nature of the Christian vision, that dissent and disobedience are not univocal and that not all dissent or disobedience is deserving of punishment. *A truly humanizing system of law would provide for legitimate disobedience and dissent.* Otherwise the legal system has absolutized itself in a manner that is reductively idolatrous. Legislators will plead administrative infeasibility here to gainsay my contention. Such a charge, however, has always accosted the emergence of some newly appreciated area of moral freedom.

2) John Noonan also speaks of the "metaphor-making capacity of law." This is a highly suggestive consideration that must engage those who work for the humanization of church law. In support of this, I would urge that there is nothing so powerful as basic, socially endorsed, untested presuppositions, biases and myths. And it is precisely in the metaphors of the law that such things come to rest. By way of example, Dr. Noonan speaks of the sacrament of penance and of how our understanding of it has been dominated by the metaphors of the courtroom. Under the reign of such an analogue, we have been led to speak of sin as *crimen*, of the liturgist as *judex* whose task is to impose sentence, etc. If the metaphors were rather sought from the event of reconciliation among friends or spouses, the juridically based necessities of enumerating crimes and imposing sentence would be evacuated of meaning. Reconciliation (unlike a trial) does not involve the necessity of citing offenses by species and number. And when the reconciliation involves a group of friends, the sacrament should be liturgized in a group context. Another dominant metaphor of the Code of Canon Law is an example worthy of analysis. Canon law refers to the fact that clergy are *mancipati* in the service of the Church. This metaphor with its connotations of chattel is hardly felicitous. Since we think inevitably through our

metaphors, this one could scarcely enhance our understanding of the clerical state. It makes sense that the *mancipati* might be told how to live, how to dress, whether they may marry or engage in business. Though all of these clerical customs are not due to this one canonically enshrined metaphor, the metaphor does not make it easier to rethink all those widely questioned aspects of clerical life. As with the sacrament of penance, a change of metaphor could be the gateway to a creative rethinking of the troubled clerical state.

3) Professor Noonan addresses the problem of the amoral agents who feel that their "professional capacity is a carapace armoring them against personal judgments of morality." He is here touching upon a huge and expanding problem which calls for the attention of all the humanistic disciplines. As corporations expand and exceed the wealth and power of nation-states, as collective life grows in controlling influence and as individual life diminishes in its capacity to determine its lot and destiny, the question of the morality of corporate power and its agents becomes more acute.

There is a tendency to think of morality in interpersonal and private terms and to allow the corporate affairs of Church and State to exist in a moral vacuum. Nevertheless, the important moral decisions are those made at the corporate level of life. Here it is decided who is rich and who is poor, who eats and who does not and, indeed, who lives and who does not. The power that decides the direction of the human species is more and more corporate and less and less personal and individual. If moral evaluation transpires at all in collective life, it is usually under the simplistic and unexpressed rubric of "the end justifies the means." This principle is particularly mischievous since it is natural for man to feel that his ends are good. Church law particularly should address this evil since it is essential to Christianity to recognize with the prophets that all of human life—national, ecclesial, and interpersonal—is under the judgment of God. To witness this truth in our laws would be both salvific and humanizing.

4) The humanization of church law requires that the law vs. Gospel debate come to be recognized as perniciously misplaced. In a sense the Church has paid a heavy price for the rescue of St. Paul from legalism. The given terms of this old debate (which come to us

partly from Paul's polemic imagery and partly from our own unhappy experience with legalism in the penitentials and in modern physicalist and absolutistic forms of natural law ethics) have engendered the distorting image of necessary conflict between law and Gospel. There is of course radical enmity between legalism and Gospel, but law and Gospel are capable of harmonious relationship.

Underlying the debate is the perennial fallacy of a supposed conflict between idealism and realism. Translated into terms of law, this supposed antagonism comes to mean that the lawyer must be narrowly pragmatic in his construction of law. Realism comes to be defined in terms of an unidealistic and even pessimistic vision of life and its possibilities. Then it becomes natural to leave your ideals, your gospel, behind when you come to pragmatic tasks such as law making. This, however, is tragic misperception of man and his potential. More realistically, the ideal should be seen as the possible state of the real, not as something in conflict with the real.

Only idealistic realism is realistic. Unidealistic pessimism represents a pessimistic faith option about human possibility. Such gloom should not suffuse the law of the Church, the community whose *Magna Charta* is the Sermon on the Mount. If church law has been characterized by gloom and tedium, it is not necessarily so. If the Spirit of the Lord were upon our laws, our laws would sing and gladden the heart of man. We could then sing as Israel sang to its God: "Thy laws are my songs."

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