A RESPONSE (I) TO DOCTOR NOONAN

With his usual thoughtfulness and insight, Professor Noonan has placed before us instances of church law which may be humanizing or dehumanizing. I will content myself with offering some brief observations on church law as an instrument of reform within the church community—we may hope that such reform is in the direction of humanizing.

First, the church law may be a means to strengthen and structure the community of believers. Public attention has been caught by the current effort at a fresh redaction of that part of the canon law which appeared as a code for the Western Church in 1917. But that effort at codification is entirely secondary, it is mere busy work, compared to the actual change of the institutes of church order—by the enactments of the Second Vatican Council, by subsequent decrees of the pope and conferences of bishops, and by legislated norms within the local churches. The bylaws of a pastoral or presbyteral council; the creation of new offices of responsibility and service within the diocesan community; the canonical emergence of a kind of new Roman Curia (the secretariats, the Commission for Justice and Peace, the Council of the Laity); the gradual—many would say too gradual—reworking of norms affecting mixed marriage and eucharistic sharing; the carefully thought out institution of the permanent diaconate; the reform of sacramental celebration in the Latin Church, in the national churches, in the local churches, to the extent that such celebration can be fixed by norm or rule—these are instances where the church law is a tool in current reform.

Some of these canonical developments merely reflect the necessities of the moment or result from strong pressures within the Christian community. Sometimes they are created in the first place by the making of statutes and decrees. Sometimes they are deductions from principles, for example, the principles of human dignity and freedom or of general participation in political, social, and cultural life. Such principles were enunciated in conciliar documents,

although most of the conciliar fathers hardly expected them to be directly applicable within the church community.

A recent paper on Innocent III's definition of marriage raised the question whether the pope intended to influence social change in the direction of personal, individual responsibility and even in the direction of clandestine marriages. Was his doctrine of marital consent planned to weaken the role of parents, families, overlords, and perhaps the ministers of the Church in favor of the individual persons? The question itself may not be susceptible of historical proof one way or the other, but it may illustrate a point about canonical reform.

Change in church order and discipline may come about because of circumstances inside and outside the church society. In the example of Innocent III there were surely influences and forces in medieval society, law, and church life to explain the pope's position. But there is also the possibility of conscious, deliberate initiative on his part to employ the canon law for change or to use it as a means to channel, guide, or deflect change already at work.

This conscious initiative may be the role of a church legislator (pope or bishop) or of a church legislature (council or conference or synod). What is new today is that those who practice church law, at least in the English-speaking world, are seeking and occasionally finding a real place in the legislative process. Practicing canonists are consciously involving themselves in the use of church law as a means to humanizing reform.

At times the process does not work well or work at all. For example, a fundamental difficulty in the aborted schema of Fundamental Law was that church officeholders would have employed the law to lessen their accountability to those whose servants or slaves they are. Sometimes canonical legislation is as little responsive to the needs of the community or the hopes of its members as is the United States Congress on the matter of gun controls. This is where the analogy of civil and canon law is at its most painful, and it suggests another point I would like to make.

Second, Professor Noonan has referred to a particular problem of the concept of vicarious responsibility within the Church. This problem could also be characterized as a hierarchical self-identifica-

tion with the Church. The danger is that those who are scrupulous to avoid transgressions in their personal lives can act arbitrarily, inequitably, and uncanonically in their leadership positions within the Church. A partial remedy is now projected, namely, administrative tribunals to hear recourse against administrative decisions of the Church's ministers. But there are altogether too many lost opportunities of reform, if only the Church's ministers had fully respected the law they expect the rest of the Christian community to observe.

This failure to respect the church law ranges all the way from neglect of canonical principles of non-retroactivity, promulgation, and interpretation to simple violations of law, for example, lack of consultation in appointment of parochial vicars, refusal of ministry by judges, neglect of synods and councils, and neglect of the very principle of synodical governance, uncanonical centralization of property administration, imposition of penalties without process. It is curious, for example, to see contemporary testing and evaluation procedures for orders and church offices when the old-fashioned canons which have the same purpose have been neglected or treated as mere formalities by the Church's ministers.

A more serious example is the recent pastoral norms for penance. These seem never to have heard of the conciliar rule for communal celebration of sacraments. This rule is surely somehow applicable to the rite of reconciliation and peace with the Church.

The conciliar law of Vatican II, again, determined once for all the clear location of pastoral responsibility for church order and discipline as within the local church. Since the council, with the exception of the minor matter of the dispensing power of bishops, this norm has been hardly noticed in the making of church law.

My second point, then, is a commonplace. Whatever the excesses of legalism, however great the need to improve the articulation of church order, discipline, and rights in fewer rules and canons, it is not always the law that is at fault. Too often it is the ordained ministers and servants who do not respect the rule of law. For the rest of the Christian people this makes of law a dehumanizing burden.

In recent years the canon law has been in some disrepute, partly because of excesses or obsolescence in the law, partly I fear because

of an irrational longing for simplicity that may only mean disunity or chaos. I think Professor Noonan, as a lawyer, will agree that the church law can be a means to reform, a check upon the Church's ministers, and an instrument of unity and of human, Christian solidarity.

FREDERICK R. MCMANUS
The Catholic University of America
Washington, D.C.