

## A RESPONSE TO JOHN T. NOONAN, JR.

### THE LEGAL TRADITION AND THE TRADITION OF THE CHURCH

It is both a humbling and a gratifying experience to be given the opportunity to respond to Judge Noonan's presentation. He has been, and continues to be, my mentor and exemplar as a lawyer, theologian, and moralist, creatively integrating these particular callings in and through his primary vocation as a person of Catholic Christian faith. It is as a law clerk for Judge Noonan that I first experienced the awesome sense of responsibility, discipline, and special type of contextual creativity involved in carrying forward something much bigger than myself and my own intellectual projects: a comprehensive tradition interweaving thought and practice that is not merely of arcane academic interest, but whose judgments of truth and falsity, of permissibility and impermissibility, have real effects on the lives of real people.

It seems to me that theologians within the Catholic Christian church, as persons of faith seeking understanding, find themselves working within and responsible to and for a tradition that is analogous to that embodied in the American legal system. There are differences, of course. No matter how flawed in her institutional manifestation, the church is and will remain a mystery, the body of Christ, and the gateway to eternal life—something that no legal or political tradition, however perfect, could ever hope to be. But like the legal system, the tradition of the church moves incarnate through time, borne by, bearing, and developing a complex and interwoven set of ideas, practices, and institutions. Like a lawyer or a judge, part of the vocation of the theologian is to help transmit that tradition, attempting to carry it forward into new times, places, and cultural contexts with "creative fidelity," to borrow the title of Father Sullivan's wonderful book.<sup>1</sup>

In the following comments on Judge Noonan's paper, I would like to act as a sort of theological law clerk might act in reading her judge's draft opinion, pressing some issues raised in the paper more deeply and pointing out some areas of possible disagreement that the opinion might generate among the other "judges" in the field.

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<sup>1</sup>Francis A. Sullivan, S.J., *Creative Fidelity: Weighing and Interpreting Documents of the Magisterium* (Mahwah NJ: Paulist Press, 1996).

## WHAT IS DIFFERENT? WHAT STAYS THE SAME?

Judge Noonan gives us an account of five instances where, in some sense, the church's teaching on a moral issue has developed over the centuries.<sup>2</sup> How radical are these developments? Do any count as reversals? In reviewing the current debate over these questions, it seems as if the participants are talking past each other. Before we can answer these questions, we need to recognize two things: first, "development" involves two aspects: that which is changed from what it was before, and that which remains the same. If we don't have both elements, we don't have development, we only have raw difference, on the one hand, or stagnation, on the other. Some theologians today (e.g., McCormick) emphasize the change; others (e.g., Dulles) the similarities.

Second, we need to see that questions of similarity and difference can be asked on three distinct levels: the close-in structure of a particular act, the logic of justification for a moral judgment, and its coherence with magisterial teaching. What looks like a significant change on one level may not appear to be the case on another.

Consider the close-in structure of an act: in the case of usury, what was prohibited (lending money at interest) became permitted. In the case of marriage, what was impossible (a sacramental marriage between Lo Ma and Dorothy) became possible. With slavery, what was permitted (owning slaves) became prohibited. In the case of religious toleration, what was required (persecution of heretics) became prohibited. Finally, with capital punishment, what was permitted (and perhaps encouraged) is now discouraged, and perhaps on its way to being forbidden.<sup>3</sup> On this level, the most significant change seems to be in the context of religious toleration: acts that were once required are now forbidden. Capital punishment, in contrast, seems not particularly problematic: moving from "permitted" to "discouraged" does not seem to be that great a change.

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

The theoretical development in slavery was a mirror image of usury. The church has long taught that slaves were human beings made in the image and likeness of God.<sup>4</sup> In the first eighteen or nineteen centuries of its existence, it

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<sup>2</sup>In addition to his paper today, Judge Noonan has written about this topic in his "Development in Moral Doctrine," *Theological Studies* 54 (1993): 662-77.

<sup>3</sup>See Noonan, "Development in Moral Doctrine," 669.

<sup>4</sup>I certainly do not mean to claim that the church's record does not include egregious

assumed that participation in the institution of slavery was not inconsistent with this belief, at least in many cultures in this fallen world. Actual experience of this institution in its worst forms (i.e., in the United States), which was different in degree but not in kind from its other forms, proved this factual assumption to be incorrect. An incorrect factual judgment, rooted in a moral failure to see the harm caused by the institution of slavery, crumbled at the insistence of the tradition's primary commitment to the dignity of all human beings.<sup>5</sup> In essence, what was viewed at most as a culture-dependent exceptionless moral norm against slavery was recognized to be a universal, exceptionless moral norm. The case of religious liberty can be analyzed in much the same way.

The death penalty, however, presents a much tougher case of conflicting commitments on the level of theory. The church formerly taught that in and of itself, it was a positive good for the state to take the life of a guilty person, furthering the common good by removing a diseased part, restoring the balance of justice through retribution, and honoring free will by holding that person accountable for his or her actions. In Pope John Paul II's *Evangelium Vitae*, it appears that the intentional taking of human life, even that of a guilty person, in and of itself is detrimental to the common good because it is harmful to the culture of life; it can be justified as a last resort if the community cannot otherwise provide for its protection. Here, one theoretical understanding of the actions that further the common good (those affirming individual responsibility) is being replaced by another (those affirming the sanctity of life) at the same level of importance. In contrast, the theoretical change in the case of marriage seems fairly small. Marriage was always both a sacrament and a contract regulated by canon law. In developing the doctrine of marriage the canon lawyers simply did what contract lawyers do: they identified one more class of people for whom a contract is voidable but not void at its inception.

The third and final level on which change can be analyzed is that of official church teaching. Which developments are most difficult to reconcile with the official teaching of the magisterium? On this level, it seems that the most radical development can be found in the case of usury. As Judge Noonan recounts in his *Theological Studies* article on development of doctrine, the categorical prohibi-

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lapses of moral insight on this point. Many American churchmen, for example, viewed slavery as a "legitimate if unfortunate" aspect of the social order, and the sufferings it imposed on slaves as no different in principle from other sufferings human beings must endure in this earthly life.

<sup>5</sup>On the way in which a legal system can create masks that blind us to the humanity of those subjected to its rules, see John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of Masks* (New York: Farrar, Straus, and Giroux, 1976). Chapter 2 deals with the legal structures that supported the institution of slavery in Virginia. See also John T. Noonan, Jr., *The Antelope: The Ordeal of the Recaptured Africans in the Administration of James Monroe and John Quincy Adams* (Berkeley: University of California Press, 1977).

tion of usury, apparently understood to encompass any profit on a loan, was "enunciated by popes, expressed by three ecumenical councils, proclaimed by bishops and taught unanimously by theologians." After the change in the magisterium's attitude toward lending money at interest, theologians needed to reconcile what appeared at first glance to be the irreformable teaching of the ordinary universal magisterium with the reforms that actually took place. The intellectual tools used in this process are familiar to all lawyers, described in Father Sullivan's two books, *Magisterium*<sup>6</sup> and *Creative Fidelity*. They include careful parsing of language, distinguishing the meaning of a proposition from its formulation, testing carefully the criteria for infallibility, reading a document in historical context, etc. They are employed with the highest level of scholastic skill and rigor in Father Vermeersch's article on usury in the 1913 *Catholic Encyclopedia*.<sup>7</sup> He notes, for example, that Pope Benedict XIV's condemnation of usury in his 1745 encyclical *Vix Pervenit* was not infallible because it was addressed only to the Italian bishops and not to the universal church, and that the 1836 decree of the Holy Office extending it to the universal church did not make it infallible because "such a declaration could not give to a document an infallible character which it otherwise does not possess."

Do these claims sound familiar? Ironically, they are precisely the sort of claims with respect to church teaching that are being made by those who wish to recast the prohibition against contraception from a universal exceptionless moral norm to a context-dependent exceptionless moral norm, just as in the case of usury. The examination of the case of usury shows that the current debate between so-called liberals and so-called conservatives cannot turn on the nature of the tools used or the distinctions made. It is a sign that we are all part of the same vital tradition of inquiry that we all use the same tools and make the same type of distinctions, although we may think they are appropriate in different cases. In short, those who wish to affirm such recasting with respect to usury but block it in the case of contraception will probably not be able to do it based solely on the nature of the ecclesiastical pronouncements at issue. Instead, they will need to draw upon and defend a distinction between the nature of the claims at issue. More specifically, they will likely need to claim that moral judgments about marriage, sexuality, and the family are tied to a less mutable aspect of human nature than claims about justice in lending, and therefore less likely to be context-dependent than the latter. But to make that claim is to move the debate from the third level, of ecclesiastical pronouncements, back to the second level, of theoretical commitment.

In short, to develop our theory of development of moral doctrine to cover Judge Noonan's cases as well as the hard cases of today, we need to clarify the

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<sup>6</sup>Francis A. Sullivan, *Magisterium: Teaching Authority in the Catholic Church* (New York/Ramsey: Paulist Press, 1983) and *Creative Fidelity*.

<sup>7</sup>A. Vermeersch, "Usury," in *The Catholic Encyclopedia* (1913) 235-38.

level at which we are making our claims about change and continuity. We need to think about the relationship among them. At very least, such clarification will prevent the discussants from talking past each other and allow them to address the issues that divide them head on.

#### HOW ADEQUATE A THEORY OF DEVELOPMENT?

Can we articulate a theory of development of doctrine that accounts for the Catholic church's complex history with respect to the five cases described by Judge Noonan? The three basic theories of development that I have come across seem inadequate to do so.

First there is the logical entailment model, which suggests that all development of doctrine is simply the articulation of propositions that are logically entailed by what the church already teaches in germinal form. I believe this model is inadequate to the church's own teaching on development of doctrine in the Second Vatican Council, as well as to the five cases at hand.

Second, there is a crude organic growth model, which can be grounded in some statements of John Henry Newman, and certain statements of the Second Vatican Council, taken out of context. This is a model of straightforward progress; summarized in the maxim "in every day and in every way we get better and better." Not only is this model too indebted to discredited nineteenth-century notions of progress, it fails to do justice to the church's history on particular issues. Did our doctrine on the freedom of a Christian really improve as we moved from the pre-Constantinian condemnation of the persecution of heretics to the Inquisition of the Middle Ages?

Third, there is a historical contextual model proposed by the Lutheran theologian George Lindbeck about thirty years ago in an article in *Concilium*.<sup>8</sup> Lindbeck suggests that development of doctrine be understood in a nonprogressive manner, as the church views and responds to one and the same object of faith from different perspectives and circumstances. While this nonteleological account of development can better account for the shifts—for worse and then for better—in the church's attitude on issues like slavery and religious liberty, it seems inconsistent with the notion of progress in faith expounded in *Dei Verbum*, which states "Thus, as the centuries go by, the Church is always advancing toward the plenitude of divine truth, until eventually the words of God are fulfilled in her."<sup>9</sup>

But I believe that the words from *Dei Verbum*, taken together with the ecclesiology articulated in *Lumen Gentium*, provide a clue to another model of

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<sup>8</sup>George A. Lindbeck, "The Problem of Doctrinal Development and Contemporary Protestant Theology," in *Man as Man and Believer*, ed. Edward Schillebeeckx and Boniface Willems, *Concilium* 21 (New York: Paulist Press, 1967) 133-49.

<sup>9</sup>Vatican II, *Dei Verbum (Dogmatic Constitution on Divine Revelation)*, in *Vatican Council II: The Conciliar and Post Conciliar Documents*, gen. ed. Austin Flannery, O.P. (1998 ed.) ¶8.

development, which I will call an eschatological model. It has four basic points. First, in understanding development, we should focus on doctrine as a whole, not individual doctrines.<sup>10</sup> No single doctrine can be adequately understood if wrenched from its place in the context of the whole tradition of the church, word and sacrament, belief and practice. Again quoting *Dei Verbum*, "What was handed on by the apostles comprises everything that serves to make the People of God live their lives in holiness and increase their faith. In this way the Church, in her doctrine, life, and worship, perpetuates and transmits to every generation all that she herself is, all that she believes."<sup>11</sup> Second, the church is a pilgrim church, moving toward the new heaven and earth but still carrying the mark of this sinful age which will pass.<sup>12</sup> Third, while the church as a whole progresses toward the kingdom, we can say that some of her particular reformable teachings and practices may devolve into something less perfect, at least in connection with the preparation for the more perfect. Here, an organic model is helpful. Taken in and of itself, the antisocial behavior of an early teen seems less mature than the docile compliance of an eight- or nine-year old; yet it accompanies the necessary psychosocial changes for a child to grow into an adult. Fourth, we cannot know which of the church's nonirreformable teachings will be changed in this manner in advance, or to put things in another way, how far we are from the kingdom of God. This fact should discourage us from asserting a global superiority over our forebears in the faith, although we may have vastly improved on particular issues.

How would this model account for religious persecution and slavery? One might argue that both the worst abuses and the eventual recognition of the immorality of these practices depended upon the church's experience of Constantinianism, a term which I use here to encompass Christianity's efforts to imprint itself on and transform all structures of human life, including the state. I believe that despite its many abuses, Constantinianism *per se* was a positive development

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<sup>10</sup>See, e.g., Newman's definition of an idea: "The idea which represents an object or supposed object is commensurate with the sum total of its possible aspects, however they may vary in the separate consciousness of individuals; and in proportion to the variety of aspects under which it presents itself to various minds in its force and depth, and the argument for its reality." John Henry Newman, "An Essay on the Development of Christian Doctrine," in *Conscience, Consensus, and the Development of Doctrine: Revolutionary Texts by John Henry Cardinal Newman*, ed. James Gaffney (New York: Image Books, 1992) 71. First and foremost, it is the ideas that develop, not particular aspects of them.

<sup>11</sup>Ibid. I also believe that Lindbeck's *The Nature of Doctrine* (Philadelphia: The Westminster Press, 1984), which draws upon a sociological analysis of religion as a cultural-linguistic matrix, can be used in an approach which focuses on development of doctrine rather than individual doctrines.

<sup>12</sup>Vatican II, *Lumen Gentium (Dogmatic Constitution on the Church)*, in *Vatican Council II*, ¶48.

in the life of the church; in fact, it allowed the church to recognize and work out the radical implications of the incarnation. Through it we learned that no aspect of human existence, including politics or statecraft, is immune from judgment and transformation in light of the gospel. Through it, we learned that the gospel judged the church, no less than purely secular powers, when it participated in these realms. In short, one might say that the Constantinian experience provided the necessary epistemological condition for the church to recognize that the prohibitions on slavery and persecution of heretics were universal exceptionless moral norms, not context-dependent exceptionless moral norms.

#### THE INTELLECTUAL AND MORAL VIRTUES OF A THEOLOGIAN

In their Common Ground discussion on Thursday afternoon, Richard McCormick and Avery Dulles disagreed about how to interpret a claim of John Courtney Murray that "it would be up to theologians to explain the continuity between the *Syllabus of Errors* and *Dignitatis Humanae*." McCormick suggested that Murray made this statement in irony or jest; Dulles opined that it was meant seriously. In my view, this is not just a disagreement about Murray hermeneutics; it is a debate about the substantive moral and intellectual virtues required by those who have the vocation of a theologian. Development of doctrine involves both continuity and change. Should a virtuous theologian stress change, or highlight continuity?

From the perspective of those who argue in favor of highlighting continuity, it might seem imprudent for theologians to focus attention on the numerous instances in which the church has in some sense changed its mind. To draw again on an analogy with the legal system, it is rather like a lawyer who argues that if the court decides for her client, it will be charting new legal territory in a bold way. Such a lawyer would be viewed as lacking the character traits generally required of those participating in the legal tradition: constancy, prudence, and humility before weight of the tradition.

What would be some arguments in favor of highlighting continuity? First, one might argue that no pure change can count as a development; the reasons for accepting the change must come from deep within the tradition itself. Newman recognized that preservation of type and continuity of principle were two notes of authentic development.<sup>13</sup> Second, in developing doctrine, a theologian actively engages in constructing the tradition, which is always multifaceted. The very process of situating the development within the broader context of the tradition constitutes the tradition's incorporation of that development, while shaping it according to its own logic. Third, theologians, like the magisterium itself, carry out their work in the light of and under authority of the apostolic tradition, just as lawyers and judges do with respect to the legal tradition. Casting their argu-

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<sup>13</sup>Newman, "An Essay on the Development of Christian Doctrine," 175-85.

ments in ways that emphasize continuity with prior thought both expresses and fosters this creative fidelity with respect to tradition. Fourth, by emphasizing difference and change, theologians undermine confidence in the day-to-day stability and reliability of the tradition and those who are its official interpreters.

What would be the arguments on the other side? Why should theologians forthrightly acknowledge change in the tradition on all three levels, even admitting mistakes if necessary? I see two basic reasons. First, one could argue that in today's world, confidence in an authoritative tradition is not eroded, but strengthened by that tradition's capacity to deal effectively with differences from the past positions, particularly if they are erroneous or incomplete. What erodes confidence in authoritative teaching of any sort (court or curia, lawyer or theologian) is an apparent refusal on the part of that authority to learn from the past. Second, one could argue that frank discussion and disagreement are in fact not harmful to a tradition but its very lifeblood; most questions are settled when interest in challenging them (or nuancing or interpreting them) peters out. Newman recognized that doctrine developed through disagreement<sup>14</sup>; Alasdair MacIntyre has persuasively maintained that a tradition functions as a historically extended *argument* about what constitutes the good life for human beings.<sup>15</sup>

In order to overcome some of the polarization in the contemporary American church, we might profitably begin an explicit discussion about the intellectual and moral virtues required of a theologian. Do they require emphasis on continuity or forthright acknowledgment of change? Judge Noonan provides a helpful model for us to begin addressing these issues, not only in his academic writings, but in his whole life and work.<sup>16</sup> He has consistently manifested a deep knowledge of and love for the church's tradition, a commitment to her community of saints as it extends across time and place, and a willingness to examine problems afresh in new circumstances in order to serve the people of God living today and tomorrow. In so doing, he embodies the virtue of creative fidelity toward which my generation of theologians can only aspire.

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<sup>14</sup>*Ibid.*, 70-75.

<sup>15</sup>Alasdair MacIntyre, *After Virtue* (Notre Dame IN: University of Notre Dame, 1980) 207: "A living tradition then is a historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition." MacIntyre acknowledges Newman's importance as a theorist of tradition in *Whose Justice? Which Rationality?* (Notre Dame IN: University of Notre Dame, 1988) 353-54.

<sup>16</sup>For a fuller analysis of Judge Noonan's work, see my "Listening for the Future in the Voices of the Past: John T. Noonan, Jr. on Love and Power in Human History," *Journal of Law and Religion* 11/1 (1994-1995): 203-28.