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THE ART OF DESCRIPTION: HOW JOHN NOONAN REASONS

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I. NOONAN'S "INNOCENCE" OF THEORY

Aristotle's *Nicomachean Ethics* circles around the interrelationship of luck, friendship, the virtues, and the importance of good teachers.¹ The authors of this Essay count ourselves the "luckiest" of people just to the extent our lives have been blessed by good friends and teachers not the least being Judge John T. Noonan. We are lucky to have been taught to remember by Noonan's extraordinary breadth of scholarship. The perennial student was lucky to have sat in the chambers of Noonan and learned what it means to lawyer, to judge, and to live as part of the church catholic.² We write, therefore, in celebration of all that Noonan has taught us through friendship and his patience as a teacher.

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1 See STANLEY HAUERWAS & CHARLES PINCHES, *CHRISTIANS AMONG THE VIRTUES: THEOLOGICAL CONVERSATIONS WITH ANCIENT AND MODERN ETHICS* 3–51 (1997).

2 Judicial clerks spend a year in a judge's chambers. Judicial clerks also travel and dine with their judges; they are privy to their judge's reasoning and analysis in cases; they lay the research groundwork for that analysis and in rare instances may inform that reasoning. It is apprenticeship at its finest. In it, one participates in and begins to learn the practices of the good lawyer and judge. This author can only count it as a gift to have served as a clerk for Judge Noonan.

By comparing Noonan's scholarship and the way he has reasoned as a judge we hope to make candid the way Noonan reasons. We do so because Noonan seldom exposes his fundamental methodological assumptions. We live in an age of theory. At least we live in an age of theory if the universities are to be credited with exemplifying the world in which we live. Yet Noonan has never felt the need to do "theory." Indeed he seems almost "innocent" of the theory wars that have dominated moral, legal, and critical theory in the time in which he has done his work. We suspect his "innocence" of theory has been carefully learned and accordingly has much to teach us about how to carry on.

For example, before Alasdair MacIntyre wrote *After Virtue*³ and, perhaps even more importantly, *Whose Justice? Which Rationality?*,⁴ Noonan had written *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists*.⁵ In that great book Noonan exemplified the kind of traditioned character of moral rationality that MacIntyre would later defend. In particular, Noonan helped us see that moral notions do not fall from the sky, but rather gain their power and rationality from practices necessary for our common life. We do not think it accidental that MacIntyre and Noonan share a common admiration for John Henry Newman.⁶

Aristotle thought significant ethical reflection depended on examples. We think few are better exemplars than Noonan. In Noonan's life and in his work we find a living example of one who has paid attention to the history and stories of the ideas and people in our world. Noonan's scholarly works and jurisprudence demonstrate the life of one who has learned the art of attention. Noonan, without theory, mastered the skill of description. To the extent that judgment cannot be separated from description, Noonan has demonstrated how to argue well, to reason well, to judge well. Moreover, Noonan's descriptions have re-presented the ideas and lives he has described in a way that helps us to see that God continues to act in our lives and, in particular, through the church catholic. The Church literally cannot live without agents of memory, story-tellers, who help us never forget that every telling is a retelling. Therefore we can think of no better way to celebrate Noonan's life and work than to remind ourselves of

3 ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981).

4 ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

5 JOHN T. NOONAN, JR., *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIAN AND CANONISTS* (1965).

6 See MACINTYRE, *supra* note 4, at 353-54; JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 5, 25 (1998).

how Noonan has paid attention to the tradition and accordingly has helped us to see and judge the world well.

II. THE SCHOLARLY WORKS

Noonan's defining treatise on contraception, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists*, was a reminder of the ways in which "[t]he law of the life of the Church is the law of organic growth, not a mechanical repetition of molds."⁷ Noonan prodded us and helped us, as a church, in this work, to pay attention to the history of that organic growth in doctrine.⁸ History can not be an optional undertaking for the Church, as properly narrating our history is the only way in which we can properly place and name ourselves in the present. As Noonan noted in this regard:

As members of the Church, we are peculiarly committed to history, because the Church is a community which not only stretches across the world in space but stretches backward in time. . . . [A]nd by the very nature of the institution we are committed to an appreciation of history. Without this appreciation, we tend to be very much in the position of a man who has lost his memory and is performing rote actions which he believes once had a purpose, but whose purpose he has forgotten.⁹

Accordingly, Noonan in *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* set out to trace such a history to help the Church properly place and name itself in relation to the controversy at the time surrounding contraception.

Noonan's stance in regard to contraception is well known. The document ultimately released as *Pastoral Constitution on the Church in the Modern World* contained the Vatican II Council's teaching on marriage and sexual relations.¹⁰ In it the Catholic Church first affirmed that sexual relations had both a procreative and unitive function.¹¹ The Council, at Pope Paul VI's request, did not address the question of contraception.¹² This decision was left to a papal commission established by Pope John XXIII to address the "pill" and expanded to

7 JOHN T. NOONAN, JR., *THE CHURCH AND CONTRACEPTION: THE ISSUES AT STAKE* 7 (1967).

8 Noonan's other works in this regard include JOHN T. NOONAN, JR., *BRIBES* (1984) and JOHN T. NOONAN, JR., *THE SCHOLASTIC ANALYSIS OF USURY* (1957).

9 NOONAN, *supra* note 7, at 15.

10 SECOND VATICAN ECUMENICAL COUNCIL, *PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD* [*Gaudium et Spes*] 47-55 (1965).

11 *See id.*

12 *See* NOONAN, *supra* note 7, at 18.

address contraception in general, again at Pope Paul VI's request.¹³ Noonan served as an advisor to the latter commission. Any doubt as to Noonan's position was clarified in his *The Church and Contraception: The Issues at Stake*, in which he presented the arguments for the use of at least some forms of contraception.¹⁴

In *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists*, Noonan gave us the detailed history of the development of the Church's doctrine on contraception necessary to place this question properly. Noonan was not unaware what was entailed in writing such a history, noting at the start of *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists*, "The history of a question is itself a work of criticism."¹⁵ Yet, one should not mistakenly assume that Noonan's work on contraception was as simple as exploring the human impact on doctrine to justify leaving it behind. Instead, Noonan undertook the careful and detailed process of exploring the development of that doctrine with an eye for remaining faithful to the tradition and texts in which that tradition is embodied as well.

As Noonan argued the Catholic tradition ought to work:

The text of a sacred document is not so important as the interpretation it is given. The Catholic community has generally recognized that the vital meaning of a biblical passage is that which the community, the Church, gives it. Yet if a book is regarded as sacred, inspired by God, as the Bible is regarded by Catholics, the texts themselves must remain a guide, a criterion rebuking extravagant hypotheses, a treasury to which the speculative theologian or legislating bishop must return. In a process that can only be seen historically as interaction, the Word of God is interpreted by the community, while the community returns again and again to the Scriptures to purify and deepen its understanding.¹⁶

In watching Noonan make such an historical argument in *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists*,

13 See *id.* at 18–19.

14 See generally NOONAN, *supra* note 7.

15 NOONAN, *supra* note 6, at 1. In this regard, Noonan notes pointedly,

In the history of the thought of theologians on contraception, it is, no doubt, piquant that the first pronouncement on contraception by the most influential theologian teaching on such matters [Augustine] should be such a vigorous attack on the one method of avoiding procreation accepted by twentieth-century Catholic theologians as morally lawful [the rhythm method].

Id. at 120.

16 *Id.* at 30.

Noonan taught us what it means to argue faithfully within a tradition. Such an argument engages the Church to return to its most deeply held practices in light of such a deepening and renewing of its understanding of its history and Scripture.

In this regard, Noonan's formation as a common-law lawyer is consonant with his formation in the Church,¹⁷ for the common-law lawyer must also take special account of history.¹⁸ By the very institution and practices of the common law, the lawyer is required to argue for a new position by supporting that new position with the cases and stories that make up the tradition so far. One must argue forward from these if one is to argue faithfully and compellingly. The way forward must always begin in the past. The argument forward from the past is the argument we find in *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists*.

Noonan continued his exploration of the canon law in *Power to Dissolve: Lawyers and Marriages in the Courts of the Roman Curia*,¹⁹ in which he again explored how a tradition remains faithful to its past while in fluid motion. Accordingly, Noonan both traced the Curia's "bold enterprise," the "[p]reservation of the ideal of indissolubility,"²⁰ and the undeniable fact: "Transformation has occurred. . . . That the changes have had a direction, that the creative innovations have been organic, that the evolution has not ended, seem hypotheses worth defending."²¹

In so doing, Noonan again instructs us how to reason and argue well within the Church. "[C]ases, as any student of the common law will testify, are an excellent way of testing principles."²² Principles and abstract concepts are empty shells that can be filled with any content. Watching a judge such as Noonan or the judges of the Curia described by Noonan apply those cases to a constellation of facts provides a fully embodied form capable of being understood and evaluated in terms of the practices necessary to sustain the goods of marriage.

17 In fact, it is Noonan, along with the defining work of Harold Berman and others, that taught us how deeply western legal systems were influenced by the canon law.

18 Likewise, both the law and doctrine have clear distinctions as to how sources are to be weighed and which judges and theologians represent the crowning moments of the tradition.

19 JOHN T. NOONAN, JR., *POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA* (1972).

20 *Id.* at xvii.

21 *Id.* at xix.

22 NOONAN, *supra* note 5, at 323.

Accordingly, Noonan tells us the story of six cases of infidelity and intrigue. In *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists*, Noonan taught us to pay attention to the history of a doctrine, to the many ideas and cultures that impacted that doctrine. In *Power to Dissolve: Lawyers and Marriages in the Courts of the Roman Curia*, Noonan began his lifelong instruction to pay attention to the stories of the lives behind the principle. Within the chapters of *Power to Dissolve: Lawyers and Marriages in the Courts of the Roman Curia*, Noonan gives us more than simply the stories of Prince Charles of Lorraine & Nicole, Signor Luis Quifel Barberini & Joanna Agnete de Almedia y Carnide, Perez de Guzman & Dona Ana Ponce de Leon, Filippo Folchi & Pauline Bailly, Paul Boniface & Anna Gould, and Fredrick Parkhurst & Marie Reid, but also the stories of the families, lovers, advocates, canonists, judges, and popes whose lives became a part of these stories, whether in significant or insignificant ways. Noonan reminds us to pay attention to these details.

[I]n the detail of many paintings a critic may discern more of the artist's sense of space and form than in a more remote study of the canvas as a whole. The novelist, psychologist, or biographer may find a character expressed in an incident. In the momentary meeting of men brought about by the requirements of law, the historian may grasp the forces and purposes of a system.²³

Demanding we understand the story of the theologian, canonist, lawyer, or litigant will be a practice embedded throughout Noonan's scholarship and judicial career.

In instructing us on the canon law's prohibition on divorce through these stories and characters, one is reminded that "the canon law is a type of public teaching even more than a system of organized sanctions."²⁴ In tracing the developments in the canon law and theology under which some marriages are now dissolvable, Noonan taught us to pay attention to marriage and its indissolubility. The retelling of such stories is itself a form of moral instruction that the canon law, apart from its commentaries and narratives, cannot do. By retelling and listening to these stories, we are reminded how it is that we are to see the world in such a way that the good of the indissolubility of marriage is preserved.

At the same time Noonan was teaching us about marriage, he was again instructing us about the practices of moral reasoning and the law, reminding us through these narratives that the law is not an abstract set of principles, but a process and practice. "If law is viewed as

23 NOONAN, *supra* note 19, at 181.

24 NOONAN, *supra* note 5, at 193.

book of answers, the nature of law as process is apt to be obscured."²⁵ As Noonan would later point out in *Persons and Masks of the Law*, "the law lives in persons. Rules of law are formed by human beings to shape the attitude and conduct of human beings and applied by human beings to human beings."²⁶

As Noonan retells the story of the judgements of the Curia, he was also reminding us how one is to judge well. Judging and acting well is an art form. Judging well is not a set of principles or a stance of disinterestedness. In Stanley Fish's words, it requires "inspired adhocery."²⁷ Certainly, it is a back and forth of returning to the past and reaching beyond to new situations. As Noonan describes this practice in the Curia:

Aware of certain traditional responses, attentive to reflections of the academic theorists, embued in European, especially Italian, culture, the men of the Curia also had a range of discretion for magical improvisation, for creativeness. The answers given were no more a transcription of secular behavior than they were deductions from the Bible. Fusing Scripture, tradition, theory, Roman law, and European customs, the Curia approved the answers which determined when the consent of believers was beyond undoing and when apparent bonds were nullities.²⁸

When we turn to Noonan's career as a jurist, we will return to this form of "magical improvisation" to also see Noonan judging as such.

In *The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams*, Noonan again takes us inside a judicial story; this time teaching us how people fail one another.²⁹ Noonan's story begins,

At the end of June 1820, in the last year of the first term of President James Monroe, a ship flying the revolutionary flag of José Artigas was boarded by a Treasury revenue cutter off the northern coast of Florida and discovered to have on board about 280 human beings in chains.³⁰

25 NOONAN, *supra* note 19, at 187.

26 JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* 4 (1976).

27 Stanley Fish, *Boutique Multiculturalism, or Why Liberals Are Incapable of Thinking About Hate Speech*, 23 *CRITICAL INQUIRY* 378, 386 (1997) (quoting Charles Taylor, *The Rushdie Controversy*, 2 *PUB. CULTURE* 121 (1989)).

28 NOONAN, *supra* note 19, at 399.

29 JOHN T. NOONAN, JR., *THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS* (1977).

30 *Id.* at 1.

The story ends with the majority of those chained human beings dead and another thirty-nine ruled on the weakest possible proof of identity the property of Spain. It is not a good story, but nonetheless it is a good story to be told. As Noonan reminded us,

History itself is not prediction but the selection of significant actions, words, and characters to be remembered—drama more than process. “Remember! Remember! Remember!”—Burke’s incantation after his prosecution of Warren Hastings [for bribery] had ended in defeat. If all that is collected here survives in memory, this account has been worth making.³¹

In so doing, in *The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams*, Noonan teaches us what it means to be an agent of memory for the Church, in this case remembering the stories we would like to forget. We need such agents of memory not simply to remind us to feel sorry for the acts of our ancestors, though such a stance may be appropriate at times. But we need such agents so as not to forget the mistakes or triumphs of the past when we as the Church struggle together with the present. Only with agents of memory in the community with the skill to both see the past in the present and remind us of the stories of the past can we learn together to be the Church despite our desire to continue not to be.

In concluding this tour of Noonan’s works, we finally turn to his most recent and in some ways most dazzling work, *The Lustre of Our Country*.³² In this book, as if simply to show that as one of his heroes, Thomas More,³³ Noonan is truly “a man for all seasons,” or all styles as the case may be, Noonan gives us in a series of successive chapters Augustine’s *Confessions*, Thomas’s *Summa Theologica*, Kierkegaard’s *Johannes de Silentio of Fear and Trembling*, and Bunyan’s *Pilgrims Progress*. Accordingly, in chapter one Noonan tells us the story of the Boston of his childhood and his early education.³⁴ In chapter two, Noonan drills us with the catechetical staccato of question and answer so familiar to readers of Thomas.³⁵ And in chapters four and seven, Noonan introduces us to Alexis de Tocqueville’s little known sister Angélique and Judge Simple and Law Clerks Boaltman, Harvardman, and

31 NOONAN, BRIBES, *supra* note 8, at xxiii.

32 NOONAN, *supra* note 6.

33 Noonan has served as President of the Thomas More and Jacques Maritain Institute since 1977. He received the Thomas More Award from the Thomas More Society of San Francisco in 1974.

34 *See id.* at 13–38.

35 *See id.* at 41–58.

Yalewoman.³⁶ In *The Lustre of Our Country*, Noonan gives us the stories and narratives that help us to understand and place the Religious Freedom Clause in the United States Constitution.

Of course, *The Lustre of Our Country* does raise serious concerns for us. Anyone who has read Hauerwas in almost any forum or venue will know that Hauerwas has placed himself in a deeply critical relationship with liberalism.³⁷ Church's writings are distinctly less voluminous, but regardless he has also placed himself in a critical relationship with liberalism.³⁸ Noonan has never felt the need to place himself as such and in *The Lustre of Our Country* sings the praises of liberalism. It may be that Noonan simply disagrees with us on this point, though we are willing to venture a friendly reading.

We take it that Noonan may not be concerned with critiques of liberalism precisely because the thick narrative of Catholicism is so determinative for him that the possibility of being seduced into the liberal tradition within which he works does not appear possible to him. We both grew up among the Methodists, with whom, for the most part, distinctions between worship and Rotary meetings can be difficult to make. We were taught early and often to speak of religion in such a way as to make it irrelevant or in any event at least impotent. As such, the risk of allowing the language of liberalism to become determinative is much more pressing for us.

Reading Noonan's autobiographical Prologue in *The Lustre of Our Country*, it is evident that Noonan was raised and lived in a distinct

36 See *id.* at 83–116, 179–210. Should one wonder regarding Noonan's loyalties: he is a Harvard Law School graduate and spent the larger part of his teaching career at Boalt Hall at Berkeley. His daughter is a Yale Law School graduate.

37 Compare NOONAN, *supra* note 6, at 348–53 (including Noonan's account of *Dignitatis humanae personae*), with HAUERWAS, *A BETTER HOPE* 109–16 (2000) (also discussing *Dignitatis humanae personae*).

38 See Richard Church, *The Breakdown of the Constitutional Tradition: Macintyrian and Theological Responses*, 14 J.L. & RELIGION 351 (forthcoming 2000); Richard Church, *The Rhetoric of Neutrality and the Philosophers' Brief: A Critique of the Amicus Brief of Six Moral Philosophers in Washington v. Glucksberg and Vacco v. Quill*, 61 LAW & CONTEMP. PROBS. 233 (1998). It is interesting in this regard that although Noonan has not taken a generally critical stance toward liberalism, he makes essentially the same argument in regard to the imposition of silence on religious voices in regard to the abortion debates that Church makes in regard to euthanasia. See JOHN T. NOONAN, JR., *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* 57–58 (1979). Noonan of course was the author of the Ninth Circuit's opinion in *Glucksberg*, see *Compassion In Dying v. Washington*, 49 F.3d 586, 587–94 (9th Cir. 1995), which was reversed by the Circuit Court en banc, see *Compassion In Dying v. Washington*, 62 F.3d 299 (9th Cir. 1995). The Supreme Court then reversed the en banc Ninth Circuit decision. See *Washington v. Glucksberg*, 521 U.S. 702, 735–36 (1997).

Catholic world where worship was strange, mystical, and meaningful.³⁹ Further, one gets the impression that the world for Noonan was as for his father, “[w]holly committed to Catholicism—what else was there? he thought—he meditated a good deal on its paradoxes and problems.”⁴⁰ For Noonan, such proper training may be constitutive in such a way that liberalism does not appear to be a viable threat.

The determinative nature of Catholicism for Noonan is evidenced by the fact that Noonan has never learned to speak apologetically about his faith. As one lawyer who practices before Noonan has noted, “He was appointed with the idea he would be a strict conservative, but you can’t count on that in civil or criminal cases.”⁴¹ Accordingly, like those members of the Curia that Noonan noted were “[a]ware of certain traditional responses, attentive to reflections of the academic theorists, embued in European, especially Italian, culture”⁴² yet nonetheless produced decidedly Catholic jurisprudence, likewise, Noonan is and has remained distinctly Catholic in his jurisprudence despite his use of the language of liberalism at times in that process. That Noonan remained so, of course, often places him in conflict with his fellow Republican appointees on the Ninth Circuit. Elements of the Republican Party share the view of the Catholic Church that abortion is murder. However, the Republican Party and the Catholic Church do not share views on immigration, the death penalty, and a host of other issues. That Noonan has and continues to frustrate conservative appointees on the Ninth Circuit with his death penalty⁴³ and immigration votes also only makes evident that Noonan is a Catholic not a Republican. He is, in Thomas More’s famous last words on the scaffold, “the King’s good servant, but God’s first.”⁴⁴

39 See NOONAN, *supra* note 6, at 15–38.

40 *Id.* at 16.

41 ALMANAC OF THE FEDERAL JUDICIARY 21 (1997).

42 NOONAN, *supra* note 19, at 399.

43 See, e.g., *Harris v. Vasquez*, 901 F.2d 724, 727 (9th Cir. 1990). Noonan issued a stay of execution to Alton Harris, concluding that Harris should have the right to present evidence on whether the failure to have adequate psychiatric assistance in presenting his insanity defense prejudiced his constitutional right to counsel. See *id.* In 1992, Noonan voted along with his colleagues in issuing further stays. In response to a series of stays, the Supreme Court ordered the Ninth Circuit to stop issuing stays of execution. Miscellaneous Order, 503 U.S. 1000 (1992). Harris’s execution began at 6:10 a.m. Apr. 21, 1992; he was pronounced dead at 6:21 a.m. See Katherine Bishop, *After Night of Court Battles, A California Execution*, N.Y. TIMES, Apr. 22, 1992, at A22; see also John T. Noonan, Jr., *Should State Executions Run on Time?*, N.Y. TIMES, Apr. 27, 1992, at A17.

44 RICHARD MARIUS, *THOMAS MORE: A BIOGRAPHY* 514 (Harv. Univ. Press 1999) (1984).

III. THE JURIST

The descriptive practices that we have noted in Noonan's scholarship are also evident in his jurisprudence. Noonan reminds lawyers to pay attention to the lives they change. As we have seen, Noonan is a consummate story-teller. He listens well and realizes that context not only informs the decision, it is the decision. Thus, in watching Noonan judge, we learn to tell the story of others well, and in so doing, learn the practices of moral description necessary to moral reasoning. Noonan teaches us to pay attention in both small and large ways.

We measure our lives in days; the passage of our lives in years. Yet, when we play the game of sentencing those convicted of federal crimes under the United States Sentencing Guidelines, we plug in values to a mathematical equation and spit out in computer-like fashion a sentence in tens or hundreds of months. In so doing, we learn to forget that it is a human life that will be imprisoned. In so doing, we obscure the toll on the families that must wait for a father or daughter for thousands of days, for years and months. Noonan demands we pay attention. This is a human life; this sentence is for years. So Noonan's opinions do not follow the convention of prosecutors and judges and speak of sentences in months.⁴⁵ Instead, Noonan instructs us, recalculate the sentence. Look squarely at what the court is about to do and address it: "Mendoza was sentenced to imprisonment for 22 years, four months."⁴⁶ These are little ways in which Noonan reminds us to pay attention.

But more importantly, substantively, Noonan demands we listen and pay attention to the stories of those before the court. One such instance is illustrative. Olimpia Lazo-Majano's case was not unlike that of most immigrants seeking asylum or withholding of deportation. The Immigration Judge ruled against her; the Board of Immigration Appeals (BIA) affirmed that decision in summary fashion; a quick trip to the United States Court of Appeals, which is granted little discretion to review BIA decisions, and she would be carted out of this country back to a war torn and impoverished homeland.⁴⁷ However, for Lazo-Majano, something happened on that trip through the Ninth Circuit Court of Appeals. Someone listened, carefully.

⁴⁵ It should be noted that Noonan, unlike many appellate judges who rely on judicial clerks to produce the first draft of their opinions, personally drafts all of his published opinions.

⁴⁶ *United States v. Mendoza*, 78 F.3d 460, 464 (9th Cir. 1996) (Noonan, J.) (affirming conviction, remanding in part for reconsideration of sentence).

⁴⁷ See *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987) (reversing denial of withholding of deportation).

In a separate case regarding the failure to properly insure that an immigrant was given counsel, Noonan noted in reversing the same Immigration Judge whom he reversed in *Lazo-Majano*, "Castro lacked what Alexander Solzhenitsyn has said to be indispensable and missing in totalitarian countries—'a clear-minded ally who knows the law.' No one was there to help him tell his story."⁴⁸ Litigants, and particularly immigrants, need lawyers or judges to listen and help them tell their story.

Like the story of those aboard *The Antelope*, however, this is not a good story, but it is a good story to be told. Lazo-Majano was a servant woman in the war torn El Salvador of the 1980s.⁴⁹ Her husband left her in El Salvador, fleeing his own political persecution.⁵⁰ She was instructed by Rene Zuniga, a sergeant in the Fuerza Armada, the Salvadoran military of the ruling regime, to come wash his clothes on her one day off every two weeks.⁵¹ She did so in a political climate in which you did what the military requested. In return, Zuniga began a systematic campaign of torture and humiliation of Lazo-Majano.⁵² Zuniga raped her repeatedly, at gun point, holding grenades to her head.⁵³ "He broke her identity card in pieces and forced her to eat the pieces. He dragged her by the hair about a public restaurant. He pummeled her face, causing a blood clot to form in one eye"⁵⁴

Lazo-Majano escaped to the United States in 1982; by January, 1983, she was before the Immigration and Naturalization Service (INS) to show cause why she should not be deported.⁵⁵ The Immigration Judge determined that she had not shown clear probability or a well founded fear of persecution on account of political opinion.⁵⁶ The BIA agreed, "the fact remains that such strictly personal actions do not constitute persecution within the meaning of the Act."⁵⁷ What happened was terrible, but our idea of political is running for office, organizing a campaign and that is all the more carefully we want to look. As noted by Noonan's dissenter, "She was a meek and humble

48 *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1313-14 (9th Cir. 1988).

49 *Lazo-Majano*, 813 F.2d at 1433.

50 *Id.*

51 *Id.*

52 *See id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 1434.

57 *Id.*

domestic, unencumbered by the opinion or status factors which Congress set forth in the statutes.”⁵⁸

Noonan was blunt and unapologetic in his opinion, beginning his analysis, “Persecution is stamped on every page of this record.”⁵⁹ Noonan, to the dismay of the dissent, noted the simple parts of the story, “El Salvador is a small country.”⁶⁰ Likewise, Noonan’s understanding of politics would not be as narrow as that of the dissent, the BIA, or the Immigration Judge. Having listened carefully, Noonan argued:

. . . Zuniga is asserting the political opinion that a man has a right to dominate and he has persecuted Olimpia^[61] to force her to accept this opinion without rebellion. . . . His statement reflects a much more generalized animosity to the opposite sex, an assertion of a political aspiration and the desire to suppress opposition to it. Olimpia was not permitted by Zuniga to hold an opinion to the contrary. When by flight, she asserted one, she became exposed to persecution for her assertion. Persecution threatened her because of her political opinion.⁶²

58 *Id.* at 1439 (Poole, J., dissenting).

59 *Id.* at 1434.

60 *Id.* at 1435. An en banc Ninth Circuit would later overrule Noonan on this portion of the opinion, prohibiting the Court of Appeals from taking notice of country reports that were not part of the administrative record before the Immigration Judge. *See Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996). Noonan dissented. *See id.* at 967–73 (Noonan, J., dissenting). As Noonan noted in another context:

Walter Jackson Bates, in his memorable life of that master moralist, Samuel Johnson, observes that the secret of Johnson’s power was his unblinking perception of reality, his refusal to put up with fashionable sham. Johnson had the ability, Bates writes to attend to “the rarest of all things for confused and frightened human nature—the obvious.”

NOONAN, *supra* note 38, at 3. The case had some similarities to *Lazo-Majano* as Saideh Hassib-Tehrani argued that she would be persecuted if returned to Iran due to her being a woman and unwilling to accept the Islamic standards regarding the dress and role of women. *See Fisher*, 79 F.3d at 960.

61 In another small way, Noonan pays attention, in realizing that how we name one another is tied up in our moral lives. He refers to Olimpia throughout the opinion by her first name. Similarly, in *Fisher*, Noonan opened his dissent noting:

To begin with, the petitioner identified herself at the immigration hearing as Saideh Hassib-Tehrmai. Despite the fact that the INS and this court have continued to identify her as “Fisher,” that appellation seems cruelly ironic when the majority denies that she was ever validly married to Fisher [meriting status to stay in this country]. It is always appropriate to refer to people by the names they give themselves. Consequently, in this dissent Saideh Hassib-Tehrani will be identified by the name she calls herself.

Fisher, 79 F.3d at 967 (Noonan, J., dissenting).

62 *Lazo-Majano*, 813 F.2d at 1435.

Attuned to subtleties less blatant than marching through the streets, Noonan noted that flight is a political act, and, likewise, silence.⁶³ Zuniga had claimed Olimpia was a "subversive."

The opinion, it might be said, is not Olimpia's. It is only imputed to her by Zuniga. And it is imputed by Zuniga cynically. Zuniga knows that Olimpia is only a poor domestic and washerwoman. She does not participate in politics.

Olimpia, however, does have a political opinion, camouflage it though she does. She believes that the Armed Force is responsible for lawlessness, rape, torture, and murder. Such views constitute a political opinion.⁶⁴

Noonan, with the support of Judge Harry Pregerson, reversed the decision of the BIA.⁶⁵ One is reminded of Noonan's description of the great canonist Thomas Sanchez, "a grave and just and subtle spirit [is] at play."⁶⁶

The dissent's criticisms were generous praise:

The holding that, as a matter of law, Lazo-Majano was persecuted on account of political opinion, is a construct of pure fiction.

....

Quite simply, the majority has outdone Lewis Carroll in its application of the term "political opinion" and in finding that male domination in such a personal relationship constitutes political persecution.⁶⁷

Writing in *The Lustre of Our Country* in regards to Ninth Circuit Judge Will Denman's "Legend" through which he found credence in the beliefs of the "I Am Movement," Noonan responds:

By imagination, extending empathy, Denman demonstrated what it was possible for a judge to do. The study of religion, the anthropologist Clifford Geertz contends, is "the social history of the imagination." By the imagination also, a religious enterprise is entered.

63 *See id.*

64 *Id.*

65 *Id.* at 1436.

66 NOONAN, *supra* note 19, at 31. This is from Noonan's description of the canonist Thomas Sanchez.

Sometimes he was betrayed by lawyer's vices of which he was not free—a fondness for distinctions, a formalism which attempt[s] to win substantive points by the rearrangement of abstract concepts—but beneath the surface of formulas and distinctions, shifts and turns, a grave and just and subtle spirit was at play.

Id.

67 *Lazo-Majano*, 813 F.2d at 1437 (Poole, J., dissenting).

Religion is not the worse for that. As Geertz puts it, there has been "a confusion, endemic in the west since Plato at least, of the imagined with the imaginary, the fictional with the false, making things out with making things up. The strange idea that reality has an idiom in which it prefers to be described . . . leads on to the even stranger idea that, if literalism is lost, so is fact." To make the empathetic, imaginative entry into religious thought, the judge cannot forget that he or she is a mortal creature facing death, seeking purpose in the universe and life that goes beyond death.⁶⁸

So also for one who is to make the empathetic imaginative entry into the life of an abused El Salvadoran woman.

Relying on clean distinctions between domestic abuse and political action, the dissent argued no political persecution had occurred or was threatened.⁶⁹ Again, Noonan responds, this time from his polemic on the abortion cases:

It is the propensity of professionals in the legal process to dehumanize by legal concepts those whom the law affects harshly His mind attends to the fiction and is untroubled by what the fiction might hide How far the masking goes depends on what there is a social imperative to conceal.⁷⁰

The social imperative of "defending our borders" is a great one, so the dissent's masking was great.

CONCLUSION

Noonan is a story-teller. He is an attentive story-teller, tracing out the history, listening carefully, sifting painstakingly. He takes the characters and the plot seriously. He has written the story of ideas such as religious freedom, of practices such as contraception and marriage, and of people such as those enslaved on *The Antelope*. He has written the stories of countless litigants such as Lazo-Majano. In telling these stories, he has trained us in practical reasoning. He has taught us how to remember. And he has taught us something about the practices of the good judge who is called to reconcile the decisions of the past with the questions of the present.

Thomas More is famously described as "[a] man for all seasons."⁷¹ Working as a judicial clerk in the chambers of Noonan, one is almost invariably under the watchful eyes of a portrait of Sir Thomas More at some point during the day. As the rhythm of a judicial year

68 NOONAN, *supra* note 6, at 173.

69 See *Lazo-Majano*, 813 F.2d at 1436-41 (Poole, J., dissenting).

70 NOONAN, *supra* note 38, at 153-54.

71 ERNEST GORDON RUPP, *THOMAS MORE: THE KING'S GOOD SERVANT* 17 (1978).

passes by, one also works under the watchful eyes of a fiery lawyer, concerned theologian, renown historian, and compassionate mentor—as well, the watchful eyes of a man for all seasons. Noonan's gifts to us are these watchful eyes. He has taught us the art of description and, in so doing, arguing and judging well. For these gifts we are grateful.