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AN OVERVIEW OF THE SCHOLARSHIP IN LAW AND RELIGION OF JUDGE JOHN T. NOONAN, JR.

*Robert E. Rodes, Jr.**

I first met John Noonan at a Law Review dinner when I was a year or so out of law school and he was a third year student. Chance placed us at the same table, and the conversation—naturally—proved to be more interesting than the speeches. When I came home and reported on the occasion to my wife, it developed that she was already acquainted with John Noonan. When they were teenagers, he had been a particularly suave and glamorous summer inhabitant of a beach resort where one of her friends also spent summers.

Not long after the Law Review dinner, John graduated and went to Washington, and we left Boston, first for New Jersey and then for Notre Dame. I heard nothing more of John until one day when Joe O'Meara, the formidable dean of the Notre Dame Law School, showed me an article from the 1955 volume of the *Journal of Legal Education* called *Value References in the Teaching of Negligence*.¹ The author had looked at all the Torts casebooks he could find, and earlier editions of many of them; at all the relevant case write-ups from the *Harvard Law Review* and the *Yale Law Journal*; at a number of law school examinations; and at all the issue sheets used by Harvard's Board of Student Advisors in supervising their moot court, the Ames Competition. He had found the value concerns in great disarray, and not much relied on anyhow. It was clear that teaching about negligence involved analysis of rules and not much else. The author (of course, it was John) admitted reluctantly that neither philosophy nor theology nor social science provided any principles that would be of much use in deciding negligence cases, but he expressed a rather wistful hope that more facts might lead to a more effective application of values to these cases. "More facts" was to be a major distinguishing quality in the rest of his work.

* Professor of Law, Notre Dame Law School. Remarks in recognition of the Honorable John T. Noonan, Jr., recipient of the *Journal of Law and Religion* award for his contributions to the field of law and religion, October 11, 1996.

1. John T. Noonan, Jr., *Value References in the Teaching of Negligence*, 8 *J Legal Educ* 150 (1955).

Joe O'Meara believed firmly that any high-standing Catholic from an Ivy League law school who cared about values should be teaching at Notre Dame, so naturally he tried to pry John loose from the East Coast and bring him aboard. It took a couple of years, but when I returned in 1961 from a year abroad, I was delighted, but far from surprised, to find John among my colleagues.

John was at Notre Dame five years, from 1961 to 1966. They were happy and productive years for all of us. I dislike the term "community of scholars" because it seems to presuppose that the joy of shared endeavor is somehow peculiar to scholars, which it certainly is not. But it was a joy we certainly had. John was working on his book on contraception.² I was doing the medieval component of my study of the English Church. John Dunne was writing *The City of the Gods*, a study of the relation between political structures and attitudes toward death.³ Tom Shaffer came in 1963 to teach Wills and Estates, and began his study of legal counseling by reflecting on how lawyers should talk to their clients about dying. Bob Blakey came in 1964, fresh from an anti-mafia section of the Department of Justice. He developed his experience into a seminar which the students called Gang Busters, and into a board game which had us moving toy cars around mean streets and collecting play money by leaving miniature black hands at strategic points.

John taught a Legal Ethics course that moved chronologically through most of recorded history, and morally through most of Dante's circles of Hell. He also ran the *Natural Law Forum*, now the *American Journal of Jurisprudence*, and served on the ill-fated papal commission on contraception. In his various capacities, he brought all manner of people to talk with us and mingle with us. David Daube, then the Regius Professor of Civil Law at Oxford came to lecture on Impossible Laws. John Rawls presented an early version of the theory that was soon to make him famous. Bernard Häring talked about some recondite questions of sexual ethics.

The well-known baby boom was in full swing in those years. There was a joke in the *Catholic Digest* about a child who was misbehaving at his brother's christening. His father said, "If you don't behave, I won't bring you next year." John dedicated his book on contraception to his colleagues in the law school, characterizing us

2. John T. Noonan, Jr., *Contraception* (The Belknap Press of Harvard U Press, 1986).

3. John S. Dunne, *The City of the Gods* (Macmillan, 1965).

in elegant Latin as exemplary fathers of families. But he did not care to join us. He spent his time at Notre Dame as a notably courtly and eligible bachelor. Whenever he felt himself weakening, he came to our house and reflected on what he saw. Once away from our daunting example, he was engaged in a matter of months.

While all this was going on, we were constantly affecting one another's thoughts, often in ways we can still not express. We had lunch together; we took walks together around the campus; we bounced ideas off one another and sometimes we read each other's manuscripts. John kept after me to overcome my Anglo-American preoccupation with primary source materials and to read a few canonists. I remember drawing on a manuscript page of his a cartoon of Clio, the Muse of History, holding a sign saying, "Noonan is a fink." I cannot recall what it was I objected to, or whether he was persuaded to change it.

I like to think of the camaraderie of these years as a kind of paradigm for John's historical enterprise. He draws people from every period of history into his reflections on law and justice. Whether the lawyers, scholars, and judges of the past do well, badly, or a little of both, it is as colleagues he finds them, and as colleagues he treats them.

Toward the end of the most theoretical of his books, *Persons and Masks of the Law*, John says, "Rules and reasons speak persuasively to persons only as the purposeful acts of other persons."⁴ To the same effect, in the introduction to *Contraception*, he disapproves of the "tendency among some historians to . . . say that the Catholic Church taught this or did that, when all that one can be certain of is that particular men, baptized Christians, occupying a particular role in the ecclesiastical system, did this or taught that."⁵ So his historical writing, both civil and ecclesiastical, is replete with particulars—whose purposeful acts spoke persuasively (or coercively) to whom; who did this or taught that, and to whom.

So as we travel through John's writings, we come on an exuberance of characters, some famous, some obscure, some infamous, some saints and savants, some knaves and fools. Here is an anonymous poor man of Nippur in Mesopotamia, circa 1500 B.C., renting the king's chariot for an early version of Chekhov's (or Danny Kaye's) *Inspector General*. Here is Cicero prosecuting a corrupt

4. John T. Noonan, Jr., *Persons and Masks of the Law* 65 (Farrar, Straus and Giroux, 1976).

5. Noonan, *Contraception* at 4 (cited in note 2).

provincial governor (whom John calls Hog, translating Cicero's pun on his Latin name, Verres). Here is Innocent III, the great papal lawgiver, accepting a silver cup from a suppliant lest he seem ungracious, and giving a gold cup in return lest he seem corrupt. Here is Martin Le Maistre, 1432-1481, "an almost totally neglected writer today," John tells us—but not neglected by John. Here is St. Thomas More, who will accept a glove from a lady petitioner, but will give back the money she has put inside it. Here is Sir Francis Bacon, who proves to be more accepting than that. Here is Samuel Pepys, who hopes to advance his fortunes through his position in the Admiralty without being unfaithful to the King, and hopes at the same time, it seems, to seduce a servant girl without being unfaithful to his wife. Here is Warren Hastings, Governor General of India, on trial before Parliament for corruption in office. John betrays his own sympathies in the case by referring to him as Hog Two. Here is John Quincy Adams, as James Monroe's Secretary of State, trying to decide what to do with the human cargo of a Spanish slave ship, illegally seized by privateers and rescued by a United States revenue cutter. Here is Cardinal Gasparri, draftsman of the 1918 Code of Canon Law, whom John introduces with a description of his birthplace in the style of Manzoni's opening to *I Promessi Sposi*. Here are two canon lawyers, Giulio Grazioli and Oreste Giorgi, drawn out of long obscurity because of their part in the annulment of a marriage between a down-at-heel Roman aristocrat and a somewhat Bohemian French language teacher. Here is the great Cardozo, wrestling with the concepts of duty and causation to determine the case of Helen Palsgraf on whom a scale fell in a railroad station. But here also are thumbnail sketches of William McNamara and Matthew Wood, the lawyers who tried the case, and Burt Jay Humphrey, the judge who presided. Here is the rising prosecutor Thomas E. Dewey, bringing home a bribery charge to Martin Manton, Chief Judge of the Second Circuit, along with a few words on Manton's previous career. Here is "Dietrich von Hildebrand, professor of philosophy at the University of Munich, the first Catholic layman to make a substantial contribution to Catholic doctrine on marriage." Here is Prince Bernhard of the Netherlands, taking money from Lockheed and giving it to the World Wildlife Fund. In the words of Dryden commenting on Chaucer, here indeed is God's plenty.

The intensely personal quality of John's engagement with the past never keeps him from providing general principles for use in the present. Each of his books ends with a masterly synthesis of

the perennial aspirations that some of his characters strove to implement, others perceived only dimly, and still others left out of account. In *Contraception*, he lists all the marital values that the traditional prohibition was meant to serve, and asks if they might not be served some other way.⁶ In *Power to Dissolve*, he lists six different kinds of marriage cases addressed by the ecclesiastical authorities, and suggests the possibility of a seventh.⁷ In *Bribes*, he puts together from millennia of experience "four reasons why bribery is likely to continue to be condemned."⁸ In *Persons and Masks*, he articulates what it means to approach history and judgment without shirking human encounter, that is, without a mask.⁹ At the end of *The Antelope*, he says:

Those who think that every human action can be explained by the necessities of the prevailing social environment, by the requirements of role-playing, the demands of national security will always be common among anthropologists, political scientists and sociologists. But every so often in a human heart the ice will crack, and a human person will acknowledge responsibility for other human persons he has touched.¹⁰

John commands an elegant range of literary styles in all his works. One chapter of *Bribes* includes his own free verse version of four cantos of Dante.¹¹ Another deftly juxtaposes Francis Bacon and Angelo in *Measure for Measure*.¹² A dozen pages in *Power to Dissolve* use a catechetical format borrowed from Joyce's *Ulysses*.¹³ Another couple of pages, introducing another chapter of the same book, might have been written by Henry James:

If, in the course of the year 1901, an alien in Rome, some pen-
sive observer of the city's medley of antique pomp and con-
temporary vivacity, had come upon an elderly Roman, a younger
American lady, and a middle-aged ecclesiastic posed in the act
of investigating a museum or church or halted in their ambula-
tions to enjoy the light upon the cupola of a great basilica per-
ceived over the rooftops, he might easily have concluded that
nothing had changed in the half-century or more that cramped
New England consciences had come to dilate in the warmth of

6. Noonan, *Contraception* at 532-33 (cited in note 2).

7. John T. Noonan, Jr., *Power to Dissolve* 403-04 (The Belknap Press of Harvard U Press, 1972).

8. John T. Noonan, Jr., *Bribes* 702 (U of California Press, 1984).

9. Noonan, *Persons and Masks* at 167-68 (cited in note 4).

10. John T. Noonan, Jr., *The Antelope* 159 (U of California Press, 1977).

11. Noonan, *Bribes* at 239-48 (cited in note 8).

12. *Id.* at 334.

13. Noonan, *Power to Dissolve* at 60-72 (cited in note 7).

Rome. Seen from a distance, in the beneficent light of late afternoon, the trio could readily have symbolized the stable relationship of American innocence and European experience under the benediction of religion.¹⁴

It turns out we are looking at an American divorcee, the Roman prince she hopes to marry, and the future Cardinal O'Connell of Boston.

John's books provide erudite fun in the reading. They must have been fun to write. It should be apparent that they are neither conventional history nor conventional legal writing. Not conventional history because they are so personal, so caught up in the play of immediate circumstances. I am still inclined to refer to historical forces and organic developments, and even to give credence to the notion out of the nineteenth century German romanticism that law emerges from a *Volksgeist*, the spirit of a people. John will have none of it. Some twenty years ago, I was so rash as to quote with approval a famous piece of Holmes' fine writing from *Missouri v. Holland* in which he likened constitutional development to organic growth.¹⁵ John was very stern with me:

This, I believe, is nineteenth century evolutionary nonsense, highly consoling to judges and text writers. In fact, words and doctrines have no life apart from their living interpreters.¹⁶

Most of the time I think he is right on this, but sometimes I waver. John never does.

The insistence that words and doctrines have no life apart from their living interpreters also sets John's work apart from conventional legal writing. I tend for my part to take legal materials at face value, and do all the work of analysis and distinction the way John and I were both taught at Harvard. I have written many pages, sometimes whole chapters, devoted to analysis of statutes and judicial opinions in almost complete disregard of the legislators or judges involved. But John says, "The reasons which the judges give are not often the reasons the judges have,"¹⁷ and then proceeds judge after judge to prove the point. There may be a metaphysical question lurking here, but this is not the place to address it.

14. *Id.* at 302.

15. *Missouri v. Holland*, 252 US 416, 433-34 (1920).

16. Quoted in Robert E. Rodes, Jr., *The Legal Enterprise* 37 (Kennikat Press, 1976). John T. Noonan, Jr., Review of *The Legal Enterprise*, 22 *Amer J Jurisprudence* 190-95 (1977).

17. Noonan, *Persons and Masks* at 164-65 (cited in note 4).

I have not yet spoken of one of John's books, *A Private Choice*.¹⁸ This devastating attack on abortion has the same meticulous detail, the same attention to the interplay of persons and purposes, that the other books have, but it has not the same exuberance. It is a somber book, written with a terrible earnestness, and the signs of a heavy heart. After summing up his findings in twelve propositions, he concludes:

There must be a limit to a liberty so mistaken in its foundations, so far-reaching in its malignant consequences, and so deadly in its exercise. There must be surpassing of such liberty by love.¹⁹

I know of no other work by an established scholar on an important topic that has received so little attention in the academic world. Reception of the book has exemplified, I think, the finding in one of its chapters that the proponents of abortion are not willing to submit their cause to serious debate.

The central theme of *A Private Choice* is the same as the central theme of all his other works—explicit in *Persons and Masks*, and implicit in everything he does. That is the transcendent character of each human being. No community, no rule, no doctrine, no statute, no opinion, no historical force (if there are any) is worthy of respect if it fails to give full recognition to that transcendence in every human being it touches. No legislator, no judge, no teacher who fails to recognize that transcendence in every human being he or she encounters professionally is worthy of our profession. It is to this truth before any other than John has borne witness in his scholarship and in his life. I hope we shall none of us fail to follow that witness where it leads.

I am honored, indeed, blessed, to have been exposed to that witness for so many decades, and deeply grateful for the opportunity to come here on this occasion and bear my own witness in return.

18. John T. Noonan, Jr., *A Private Choice* (The Free Press, 1979).

19. *Id.* at 192.

