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2014]

## READING JOHN NOONAN

JOSEPH VINING\*

JOHN Noonan has done more than any in our time to save law and the rule of law for those who more and more are looking to it around the world, more to brace those who in reading him sense that they are reading themselves as they would wish to be, and more to speak the truth to those who cannot bring themselves to speak it. I want in this tribute to touch on the ways Noonan has been bold and true, and do so in the course of a brief look at two of his books—*Persons and Masks of the Law* from 1976,<sup>1</sup> and *A Church That Can and Cannot Change* from 2005.<sup>2</sup>

## I

Noonan takes readers of *Persons and Masks* to the basis of thought: “[S]ome vision of the construction of the universe will be found to underlie anyone’s account of law.”<sup>3</sup> People did not reach so far in 1976.<sup>4</sup> It would have been shocking to most if they heard themselves saying anything like this. But it is true. I think we all know it is true, which leaves us individually to ask what our vision is of the construction of the universe. Each of us has a sense of it, however deep down in us it is. What do we think we think, and what do we actually think?

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1. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* (2002) [hereinafter *PERSONS*].

2. JOHN T. NOONAN, JR., *A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL TEACHING* (2005) [hereinafter *CHURCH*].

3. *PERSONS*, *supra* note 1, at 71–72.

4. Unless, that is, they were trying to grasp the life and thought of Oliver Wendell Holmes. In 1977, Holmes’s third official biographer, Grant Gilmore, described the world as imagined by Holmes as “bleak and terrifying” and Holmes himself as “savage, harsh, and cruel.” GRANT GILMORE, *THE AGES OF AMERICAN LAW* 49 (1977). But cruelty was meaningless in the world in which Holmes tried to live or thought he lived, since it was without persons, or indeed individuals. Law, for Holmes, was “like everything else” in the universe and “[t]he postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents.” Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897); *see also* JOSEPH VINING, *FROM NEWTON’S SLEEP* 274, 372 n.28 (1994) (discussing *The Path of the Law*); Joseph Vining, *The Cosmological Question*, 94 MICH. L. REV. 2024, 2025 (1996) (discussing Holmes’s definition of “Law” in *The Path of the Law*).

Gilmore died leaving the biography he had worked on for fifteen years unfinished and unpublished. The half-century effort to commission an official biography of Holmes was abandoned. *See* ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 31–33 (2000).

The lectures John Noonan began in 1971, that ultimately became *Persons*, were the Oliver Wendell Holmes Lectures of 1972.

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Many will be surprised at the difference between what they think they think as they make their way through life today, and what they actually think. They may find even foreign what they actually think, while they say and do what others who claim authority over them demand. Noonan knows that moving toward their actual vision will change the articulation of their thought, and with it their account of law and its authority.

Then Noonan points to love in the structure of the universe and to love's role in all moral feeling, thought, and development. "The central problem, I think, of the legal enterprise is the relation of love to power."<sup>5</sup> "[M]oral education," he adds, is "essential to the professional preparation of lawyers, who are to be formed less as social engineers than as the charitable creators of values."<sup>6</sup>

Again, use of the very word "love" in a professional setting would have been shocking thirty-eight years ago. If it is less so today, that is Noonan's achievement. He felt able to end his prominent response in 1998 to contemporary attempts to reduce law to economics, "[l]ove is not simply an emotion, a sentiment . . . . It is the Love 'that moves the sun and the other stars' that also moves Dante . . . ."<sup>7</sup>

## II

The universe. The love built into its very structure. Then the universality of fundamental human values:

So many of us struggle with how far what we take to be important and moral can be allowed to reach in our understanding of humanity as a whole. We wonder, even when we wish we did not, how grounded value is, how much discovered rather than created solely by us, how much it comes to us from beyond the conventions of our culture as well as from inside us. We cannot imagine warming to an abstract rule, and without our warmth it has no real authority for us. Our wondering extends back in time to the morality and meaning of our predecessors, as much as it extends to the other side of globe right now.

Noonan explores this common doubleness of mind throughout what he has given us. He especially takes up the first way the question of universality lives with us, and looks to the fact of change in moral and legal values over the course of history—change over time rather than over distance. "Development" is his word for it. Development in understanding what our predecessors have said and done affects the hold that old papers and old decisions have over us in our own thought and practice. The challenge to their hold on us pulls in legislation that seeks to initiate or confirm change too, for any document emerging from a legislature is dropped into an existing web of past understandings and decisions and

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5. PERSONS, *supra* note 1, at xx.

6. *Id.* at xix.

7. John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768, 1775 (1998) [hereinafter *Problematics*].

must find its place there, categorized, colored, and channeled by them. How is it, Noonan asks, that the fact of change over time can be faced and accepted, without emptying the very notion and sense of authority in law and religious belief today?

Here I turn to Noonan's book a generation later, *A Church That Can and Cannot Change*. His principal subject is slavery and its movement from acceptance and maintenance by law and church, as "natural" even, to its recognition as "intrinsic evil" today, as without justification in any context, like torture.<sup>8</sup> He chooses the pervasive moral and legal issue that presents the phenomenon of change in its strongest form.<sup>9</sup> We believe enough in our own goodness and rightness to be able to do or be in on the doing of the terrible things we often do in law—kill, imprison with "civil death" in a known kind of hell, impoverish and bankrupt, rip children from the arms of a parent, torture animals, on and on. If those who gave us our Constitution and built the tradition of the Church, and who made decisions we follow today, did engage in intrinsic evil, and thought themselves good and right too, how can we allow even our own values to comfort and guide us?

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8. See CHURCH, *supra* note 2, at 5.

9. Chapter 2 of *Persons*, "Virginian Liberators," focused attention on Founding Fathers in Virginia, identified with the ideal of liberty and justice for all, actively engaging in maintaining and tightening Virginia's law of slavery. See PERSONS, *supra* note 1, at 29–64. "The Virginia paradox is the legal paradox, generally." *Id.* at 58. A year later, Noonan supplemented his historical treatment of the problem in *The Antelope*. See generally JOHN T. NOONAN, JR., THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS (1977). Chief Justice Taney responded to the paradox, or problem, in one way before the Civil War in *Dred Scott v. Sandford*, 60 U.S. 393 (1856). With seven justices joining his opinion, Taney quoted the Declaration of Independence: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness . . ." *Id.* at 410 (internal quotation marks omitted). He continued,

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others . . .

*Id.*

I was raised in the South in the forties and fifties. The experience in our country of slavery maintained by law and lawyers did not end with the Thirteenth Amendment. The evidence was all around me, and there was no challenge from the churches also all around me.

I dealt with slavery in the reading I did on my own. I had Faulkner and Tolstoy to help me. I dealt with it in some intellectual way throughout my schooling. But I can say here, in confession and admiration, that I think I had never felt so connected personally with what slavery really meant until I read this book. I read absorbed. The book is beautiful in its form and in its sentences despite its chilling substance, as if Noonan were continually reminding the reader how human life can be lived. Its chapters and sections are like verses.

Noonan is generous to all at its end. Nonetheless, I have found myself since troubled too by the brutality of slavery in ancient Greece and Rome, those high civilizations, as we call them, on which so much of my education and taste were built. I wonder how I would have read Cicero's orations as a boy in school if I had been fully aware of the treatment of human beings that made them possible. I do not know how far the art, architecture, and literature of Greece and Rome can be separated from it, though I separate the Gospel and the early church from it and can work with Noonan's help to separate the tradition of the Church from it.<sup>10</sup> I do

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10. Among other contemporaries responding to this personal question of separation, the theologian and historian David Bentley Hart is especially helpful in setting it in its larger context. *See, e.g.*, DAVID BENTLEY HART, *ATHEIST DELUSIONS: THE CHRISTIAN REVOLUTION AND ITS FASHIONABLE ENEMIES* (2009). In the introduction Hart remarks:

This book chiefly—or at least centrally—concerns the history of the early church, of roughly the first four or five centuries, and the story of how Christendom was born out of the culture of late antiquity. My chief ambition in writing it is to call attention to the peculiar and radical nature of the new faith in that setting: how enormous a transformation of thought, sensibility, culture, morality, and spiritual imagination Christianity constituted in the age of pagan Rome; the liberation it offered from fatalism, cosmic despair, and the terror of occult agencies; the immense dignity it conferred upon the human person; its subversion of the cruelest aspects of pagan society; its (alas, only partial) demystification of political power; its ability to create moral community where none had existed before; and its elevation of active charity above all other virtues. Stated in its most elementary and most buoyantly positive form, my argument is, first of all, that among all the many great transitions that have marked the evolution of Western civilization, whether convulsive or gradual, political or philosophical, social or scientific, material or spiritual, there has been only one—the triumph of Christianity—that can be called in the fullest sense a “revolution”: a truly massive and epochal revision of humanity's prevailing vision of reality, so pervasive in its influence and so vast in its consequences as actually to have created a new conception of the world, of history, of human nature, of time, and of the moral good. To my mind, I should add, it was an event immeasurably more impressive in its cultural creativity and more ennobling in its moral power than any other movement of spirit, will, imagination, aspiration, or accomplishment in the history of the West. And I am convinced that, given how radically at vari-

believe it was as evil then as it is today, as he believes. I know, as does he, that necessary to this belief is belief in the universality of fundamental human values, on which any sense of melioration and progress depends.

Of course, there are doubts about the universal in anything human and about progress in moving toward a humane world. However hard we work for betterment in the particular ways we do, I think most of us carry the burden of these doubts when we reflect on what we have achieved or failed to achieve for others than ourselves. But this is the beauty of Noonan's addressing our conflict by focusing on change:

It is by reflection on the promptings of love that morality begins, that the requisite human response to the human stranger . . . becomes clearer. . . . By experience, by analogy, by more inclusive seeing, and also by argument, reasoning, and moral theorizing, morality is developed . . . .<sup>11</sup>

The course of moral doctrine, like that of [a] great river, appears to follow no rule. Plunging over heights, striking boulders, creeping in almost motionless channels, it defies prediction, can scarcely be the subject of science. . . . [It is t]he testing of what is vital . . . . What is required is found in the community's experience as it tests what is vital. On the surface, contradictions appear. At the deepest level, the course is clear.<sup>12</sup>

Hearing Noonan's eloquent voice as I read *A Church That Can and Cannot Change*, I recalled the effect on me of discovering Václav Havel's address to the Canadian Senate and House of Commons in 1999. Noonan was giving me that experience again. "I have often asked myself," Havel said at the end,

why human beings have any rights at all. I always come to the conclusion that human rights, human freedoms, and human dignity have their deepest roots somewhere outside the perceptible world. These values are as powerful as they are because, under certain circumstances, people accept them without compulsion and are willing to die for them, and they make sense only in the perspective of the infinite and the eternal. I am deeply convinced that what we do, whether it be in harmony with our conscience, the ambassador of eternity, or in conflict with it, can only finally be assessed in a dimension that lies beyond that world

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ance Christianity was with the culture it slowly and relentlessly displaced, its eventual victory was an event of such improbability as to strain the very limits of our understanding of historical causality.

*Id.* at x–xi.

11. *Problematics*, *supra* note 7, at 1775.

12. *CHURCH*, *supra* note 2, at 221–22.

we can see around us. If we did not sense this, or subconsciously assume it, there are some things that we could never do.<sup>13</sup>

### III

The universe. The human universal. Love. The last of the large subjects of Noonan's work I want to notice here is the person in legal thought.

Let us turn back to *Persons and Masks of the Law*. The more general subject of *A Church That Can and Cannot Change* is the place of authority in a world of change and development. In *Persons and Masks of the Law*, Noonan focuses directly on the question of the person and the personal.

The reception of the 1976 edition of the book had been such that it was republished in 2002, with Noonan adding a new Preface to his 1976 Foreword. His Foreword describes his principal subject as “the place of the person in the understanding of law . . . with the purpose of bringing at least some ‘professionals’ into the camp of the ‘humanists.’”<sup>14</sup> His new Preface to the 2002 edition describes the book’s “central question” as “the place of rules in the legal system if the process takes persons into account.”<sup>15</sup> He adds, “[t]he book, as will be seen, defends rules as indispensable.”<sup>16</sup>

Were it not for his subsequent reference in the new Preface to the rarity of his dissents (3.4%) in judging the cases he had heard since joining the Ninth Circuit Court of Appeals in 1985, and the examples he gives of situations where more attention might be paid to persons in a case, one might think that the 1976 Foreword and the 2002 Preface are offering two ways of stating the same question.

His 2002 examples include forms of address and reference in speaking and writing. He calls them “modest ways” of paying attention to persons.<sup>17</sup> Beyond those, there are the examples of close cases, cases where “the precedents are varied or unclear,” and particular areas of law where this is done—sentencing in criminal law, asylum petitions, cases involving

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13. Václav Havel, *Kosovo and the End of the Nation-State*, THE N.Y. REV. OF BOOKS (June 10, 1999), <http://www.nybooks.com/articles/archives/1999/jun/10/kosovo-and-the-end-of-the-nation-state/?pagination=false>. The extraordinary work of the well-known internationalist, Philip Allott, builds a legal world in which the universal is recognized and realized. See, e.g., PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* (2d ed. 2001); PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* (2002); see also Philip Allott, *Law and the Challenge of the Transcendental: Rethinking the Order of All Order*, HARVARD LAW SCH., INST. FOR GLOBAL LAW & POL’Y WORKSHOP, (Jan. 4–14, 2013), available at <http://www.trin.cam.uk/show.php?dowid=1614>.

14. PERSONS, *supra* note 1, at xvi.

15. *Id.* at x.

16. *Id.*

17. *Id.* at xi.

religious freedom, and cases involving sovereign immunity.<sup>18</sup> Against the panoply of the whole of law these would seem rather modest also.

Indeed, there is something of an impression left by the 2002 Preface of modulation and pulling back from the passion that drove the ending of the 1976 Foreword that he wrote when he wrote the book:

[Law is] a human activity affecting both those acting and those enduring their action. The analytic bent of most of those now so engaged leads them to reduce “person” to a congeries of “rights,” with the highest ideal, if any is expressed, to do “justice” by enforcing the rights. . . . But it is necessary to insist that the person precedes analysis, and to seek to do justice in the narrow sense is no more a full human aspiration than such justice is the sum of human virtues.<sup>19</sup>

But we have beside us *A Church That Can and Cannot Change*, if we wonder what to do with such an impression. It appeared shortly after the new 2002 Preface, in 2005, and there is certainly no pulling back in it. *Persons and Masks of the Law* remains a radical book, as radical read today as it was in 1976.

“The person precedes analysis,” at the end of the 1976 Foreword just quoted, is, I think, the critical perception. The mere enforcement of abstract rights connected to abstract entities on either side of a case fails to do justice, except in a sense that bleeds justice of its meaning. The object of a legal system with true authority is law and justice both.

In fact, “law and justice” is a phrase heard often today. The object of “the law” is commonly described in this way. Behind the combination of law with justice is a long institutional history, the present outcome of which is part of the context of Noonan’s radical call to look and to see.

There was at one time a court called a court of law, in which rules were enforced by sanctions, and another court called a court of equity or the Court of Chancery, to which those injured by the way rules of law worked could turn and be heard with arguments that a particular outcome was unjust given the full circumstances of the case and its participants. Both courts were august, sitting in their own palaces. The Law Lords had such remedies as were spelled out in the rules. The Lord Chancellor representing the sovereign had his own remedies, “equitable remedies”—injunctions, “constructive” trusts, restitution. The rules, which were called “law,” were applied. The court of equity was at hand to do “justice.”

Then, over time, the two courts were merged into one court. The Law Lord and the Lord Chancellor became one judge with two roles. Then “law” and “equity” themselves, two mentalities each with their supporting body of precedents, were merged in jurisdiction after jurisdiction. The two roles of the judge were merged into one with now both sets of

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18. *Id.* at x–xiii.

19. *Id.* at xix–xx.



remedies available. In the federal system this happened in 1938,<sup>20</sup> the year I was born and therefore by definition recently. In Virginia the merger took effect in 2006, very recently.<sup>21</sup>

This is not Noonan's account. He is too good a historian to link what he sees to this legal development, which may have been meant to be one of nomenclature only. I mention it as a device to help us grasp Noonan's purpose and vision. In this merger of "law and equity," a law of rules and abstractions might have swallowed a law of justice without digesting it. What Noonan presents is an "understanding of law"<sup>22</sup> in which a law of justice swallowed a law of rules and did digest it. Justice became part of what was sought and what was argued and what was taught in every case. In every case: this is what makes Noonan's perception remarkable, radical, and true. Decision makers seeking guidance in the body of legal texts and hoping they may be able to say they find a rule in them, must also take into account the actual persons involved in the case and their circumstances, "invoking," as he says, "a tradition of equity jurisprudence with which so much that I have written here has affinity."<sup>23</sup> Who the defendant is, who the plaintiff is, how they came to their places in court, who is presenting the arguments, are among all the particulars of the case that may be relevant. Though "it would be a travesty of what I believe," he says, "to suppose that law could exist without rules. At the intersection of rules and persons, the process to be understood occurs."<sup>24</sup> Again, Noonan writes in 1976, "my principal subject [is] the place of the person in the understanding of law"<sup>25</sup> and in 2002 "[t]he central question . . . is the place of rules in the legal system if the process takes persons into account."<sup>26</sup> "[T]he person precedes analysis" still.<sup>27</sup>

I might freshen the examples Noonan gives of cases in which the actual persons before the court are not seen, as a slave is not seen, with a recent case in Ohio. In 1994, Judge Allan Davis in the Hancock County Probate Court declared Donald Miller dead several years after he mysteriously disappeared, so that his ex-wife, Robin Miller, could apply for Social Security benefits for their two daughters. Nineteen years later, Mr. Miller showed up, wanting to apply for a driver's license and reactivate his Social Security number, and petitioned Judge Davis to reverse his declaration of

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20. See Charles E. Clark, *The Federal Rules of Civil Procedure 1938–1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 436 n.8 (1958). For a stimulating and engaged account of equity in English law and history, and of the treatment of equity in disciplines other than law, see GARY WATT, *EQUITY STIRRING: THE STORY OF JUSTICE BEYOND LAW* (2012).

21. See W. Hamilton Bryson, *The Merger of Common-Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 77, 77 (2006).

22. PERSONS, *supra* note 1, at xvi.

23. *Id.* at 98.

24. *Id.* at 19.

25. *Id.* at xvi.

26. *Id.* at x.

27. *Id.* at xx.

death. A lawyer for Mrs. Miller, James Hammer, opposed the petition on the ground that she might have to return the benefit payments received from Social Security and did not have the money to do so. Judge Davis ruled that Ohio law does not allow a declaration of death to be reversed after three years or more have passed. “[Y]ou’re still deceased as far as the law is concerned,” he said to Mr. Miller sitting in the courtroom.<sup>28</sup> “I don’t know where that leaves you.”<sup>29</sup> The case, he said later, was decided “in strict conformity with Ohio law.”<sup>30</sup> Mr. Miller’s lawyer, Francis Marley, said Mr. Miller could not afford to appeal. He added, “[w]e hoped the judge would see the equity of giving his life back.”<sup>31</sup>

It remains to ask what or who the persons are that must be taken into account in decision-making in a legal system that does justice. Thinking and speaking of “persons” already extends quite far in our daily experience and may be spreading further.

Noonan uses the word “individual” from time to time. He speaks of “developing a sense of justice—a sense of what was due to particular individuals in a concrete situation.”<sup>32</sup> “By masks,” he says, “I mean ways of classifying individual human beings so that their humanity is hidden and disavowed. . . . [I]n any sociological analysis, the masks may be seen as devices reflecting the structure of society and the degrees of its acknowledgment of humanity in different groups.”<sup>33</sup> Contrasting masks and roles, he says:

Roles are as necessary for the display of human love as clothes for the display of human beauty. The naked individual rises to the communal expectations invested in the role . . . . No more than clothes does a role obscure the human visage. But as a hat can be pulled down to cover a face, so a role, misused, becomes a mask obliterating the countenance of humanity.<sup>34</sup>

The masks of the law are “[n]either individual projections nor objective artifacts, neither social roles nor literary disguises.”<sup>35</sup>

In speaking of the limitations of any quantitative understanding of law, he remarks, “It is difficult to persuade any individual human being that such abstractions are commensurate with himself or herself. The complex rationality of individuals escapes reduction.”<sup>36</sup>

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28. John Schwartz, *Declared Legally Dead, as He Sat Before the Judge*, N.Y. TIMES (Oct. 11, 2013) [http://www.nytimes.com/2013/10/12/us/declared-legally-dead-as-he-sat-before-the-judge.html?\\_r=0](http://www.nytimes.com/2013/10/12/us/declared-legally-dead-as-he-sat-before-the-judge.html?_r=0).

29. *Id.*

30. *Id.*

31. *Id.*

32. PERSONS, *supra* note 1, at xviii–xix.

33. *Id.* at 19, 23.

34. *Id.* at 21.

35. *Id.* at 25.

36. *Id.* at 164.

“Person” is used by Noonan almost as a synonym of “individual.” By “persons,” he says,

I mean particular flesh and blood and consciousness. I take as a starting point that we are such beings, that we encounter such beings, and that encountering them we recognize those who are in shape and structure, in origin and destiny, like ourselves. I assume that we have the experience of responding to persons.<sup>37</sup>

He asks, for his reader,

[A]re persons merely a collection of roles—husband, father, lawyer, etc.? I take persons to be ontological realities, perceptible through the roles, distinguishable from both roles and masks. . . . If a lawyer could not distinguish between real persons and fictional persons such as corporations or trees, he would not be capable of communication.<sup>38</sup>

As for “the law,” Noonan comments that “Holmes gave it a fictitious life. No person itself, the law lives in persons.”<sup>39</sup>

Readers will understand what Noonan has in mind in referring to persons as well as to individuals. “Person,” rather than “individual,” is the term of reference to human beings in the Constitution: there are “free persons, including those bound for service for a term of years,” “citizens,” “Indians not taxed,” and “all other persons.” “Other persons” is the Constitutional euphemism for “slave,” a word that does not appear in the Constitution until the Thirteenth Amendment, and slaves were to be counted in determining the population of a state for purposes of setting its number of Congressional representatives as three-fifths of a person. “Person” is also the primary term of reference in the Church, and it inhabits ordinary speech in many ways. It is a standard term in many areas of law.

But there are ambiguities in its general use, indicated by Noonan’s confidence that we are always able to see the difference “between real persons and fictional persons such as corporations or trees.”<sup>40</sup> A slave might be a person but not a “legal person.” In the awful words of Chief Justice Taney, speaking for the Supreme Court in 1856, a descendant of an American slave “had no rights which the white man was bound to respect . . . .”<sup>41</sup> By contrast, corporations were never “flesh and blood,” but

37. *Id.* at 26.

38. *Id.* at 27.

39. *Id.* at 4. Does human experience teach that real persons must be flesh and blood, or human? The law as Holmes describes it can have only a fictitious life. But in legal method and practice we cannot do without the presupposition of a caring and living mind beyond the individual. For some discussion on my part, see Joseph Vining, *DILEMMA: Faith and Failure*, in *THE AUTHORITATIVE AND THE AUTHORITARIAN* 45–60 (1988).

40. See *PERSONS*, *supra* note 1, at 27.

41. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856). Justice McLean replied in his dissent, “A slave is not a mere chattel. He bears the impress of his Maker,

they are legal persons. So are the great administrative agencies. Neither corporation nor agency can be reduced to the human individuals associated with them or speaking for them and constantly being replaced. Lawyers sue on their behalf, and they can be sued without individuals associated with them being drawn in.

In the case of corporations, including the Church, they have property of their own and not as in a form of trust. Human individuals often have quite limited claims on them or claims on them linked to fiduciary duties to them. Corporations claim, and are granted as persons today, some constitutional rights of their own. Beyond this, developments in criminal law have made them chargeable with serious crimes, the *mens rea* elements of which are corporate and apart from any individual's *mens rea*. When convicted, a corporation's sentence, which can include mandated change within and a period of oversight from without, can be set by its score on a "corporate culpability scale" and can be mitigated by "corporate remorse." The question of their "ontological reality" has become harder and harder to answer.<sup>42</sup>

The general difficulty is that persons are regularly made and unmade in the legal system. Noonan makes the point himself: "Legal education," he says, "has often been education in the making and unmaking of persons."<sup>43</sup> The subtitle of Colin Dayan's fine 2013 book, on law's collaboration in the perpetuation of slavery even today, is *How Legal Rituals Make and Unmake Persons*, which I judge from the book to be a reference and a tribute to Noonan.<sup>44</sup> In fact, the person in everyday life is made and sometimes unmade. The friend who is present to us, as a person we know, is half-constructed by us. Consciously, semi-consciously, or unconsciously, we are always sifting through what an individual says and does as an individual, and either identifying it with him or her as a person who exists over time, or putting it aside as mistake or inauthentic. We do the same with ourselves. You sit in judgment on what you say and do, wondering whether that was really you who said or did it.

Human individuality is not made and unmade. It is the first thing we know, and the last. It is not our uniqueness, though each of us is unique. That would not distinguish us from any river stone we might pick up. It is rather that about us that interferes, blunts, or stops others' quantitative

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and is amenable to the laws of God and man; and he is destined to an endless existence." *Id.* at 550 (McLean, J., dissenting).

42. For discussion of the question, see, what I think is still the finest piece in English on corporate purpose and the nature of a corporate entity, W.M. Geldart, *Legal Personality*, 27 L.Q. REV. 90 (1911); see also Joseph Vining, *Corporate Crime and the Religious Sensibility*, 5 PUNISHMENT & SOC'Y 313 (2003). But see Tracy Fessenden, *Response to Joseph Vining's 'Corporate Crime and the Religious Sensibility'*, 6 PUNISHMENT & SOC'Y 105 (2004). See generally ERIC ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* (2013).

43. PERSONS, *supra* note 1, at 58.

44. See COLIN DAYAN, *THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS* 2, 23, 264 n.37 (2011).

and utilitarian calculation in their treatment of us. The individual is not known to the natural sciences or the social sciences. It has no place in them. But the individual is known to theology, to psychiatry, literature and art, and to law.<sup>45</sup>

Readers who come to this wonderful book may assume references to the individual are references to the person. But the terms are not synonymous. I suggest that Noonan's meaning is served when "individual" comes to supplement "person" in the reader's mind. Thought of the person would be kept centered on our human condition as Noonan intends it to be. There are nonhuman persons all around us. There is also nonhuman flesh and blood and perhaps consciousness all around us—those animals who are being seen more and more as individuals in scientific work as well as in law, and who in law are therefore being protected more and more by statute and constitutional recognition.<sup>46</sup> Indeed, there is expressed fear today within the Institute of Medicine and the National Academies of Science that this rapid development of law governing human relationships with animals will end with some sentient animals being viewed as legal persons, with unquestioned ontological reality.<sup>47</sup> Noonan's powerful call to look and see is also a call addressed to the humane in us.

There is always the question of the place of roles in understanding the person's relation to the individual. Noonan observes, as we have noted, that a person is not a collection of roles, is perceptible through the roles, and is distinguishable from both roles and masks. He compares a role to clothes for the naked individual that help in active service to others. In distinguishing role from mask, he says, "The lawmaker and the judge and the litigant are all carrying out positions assigned them by society, all are the players of roles. They have not been identified with those parts."<sup>48</sup>

But a person does have an identity in his or her own eyes and in the eyes of others. It emerges from an individual's life and does not have the fictive quality that attends playing a part. Becoming a person is bringing purposes and values into one's world that connect one with other individuals in their worlds. One's purposes and values are not all one's own, and

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45. For further discussion, see Joseph Vining, *Dignity as Perception: Recognition of the Human Individual and the Individual Animal in Legal Thought*, in UNDERSTANDING HUMAN DIGNITY 573–90 (Christopher McCrudden ed., 2013) [hereinafter *Dignity*]; Joseph Vining, *The Consequence of Human Differences*, 5 J.L. PHIL. & CULTURE 21 (2010).

46. Noonan may indeed be referring to them as "beings" of particular flesh and blood, and consciousness. I take as a starting point that we are such beings, that we encounter such beings, and that encountering them we recognize those who are in shape and structure, in origin and destiny, like ourselves. I assume that we have the experience of responding to persons.

PERSONS, *supra* note 1, at 26 (emphasis added).

47. See *Dignity*, *supra* note 45; Joseph Vining, *Human Identity: The Question Presented by Human-Animal Hybridization*, 1 STAN. J. ANIMAL L. & POL'Y 50 (2008).

48. PERSONS, *supra* note 1, at 20.

they are not realized alone. They are in Noonan's words vital, fundamental, and can sometimes be worth devoting an entire life to, or dying for, as clothes and playing a part could never be. They call to us. They excite our imagination and creativity. They speak to us in a real way. Noonan ends the book with this speaking:

[Good purposes] exist now in living human persons recapturing the thought of past living persons. These purposes, and with it their vitality, their toughness, arise out of the lives of past persons; they speak to us out of those lives. Whether they are moral ideals or judicial opinions, they must be understood in the multiple contexts which enfold each individual's experience. The act of understanding enhances our power to discriminate between what was fundamental . . . and what was, even within their own framework, weakness or misapprehension or contingent solution. . . . Persons speak to persons, heart unmasked to heart.<sup>49</sup>

Thus, on the one hand, we have ourselves as individuals, each of us necessarily at the center of the world as he or she sees it and believes it to be, each with power to say "no" or "yes" to life, "no" or "yes" to the way the world is, "no" or "yes" to others' propositions about the world and to their actions in the world. On the other hand, we have ourselves as persons identifying with moral realities and aspirations that make us human in small ways and large. Each of us is a miraculous fusion of the two without the loss of either.

Might it not be this fusion that readies us for what Christ offers us? I hesitate, as a lawyer who is not a theologian, to speak so directly about divinity itself, to speak as I think John Noonan can. But let me just suggest that Christ's offer might be expressed as an offer to bring us, with a human identity by virtue of fusion of this kind, then into the divine presence in Him. In fusing our ineradicable individuality with a humanity that cannot be thought about or spoken of except by acknowledging the actual presence of other individuals, in being penultimately taken into values that exist beyond any of us individually and animate us in life, we move toward participation in the Divine. A double negative may for once actually help: the Divine a person, a person not utterly and completely unlike us.

Personal reflection on who or what a person is may lead some to such a thought as this. But Noonan does not assume or try to lead his readers toward the visualization of divinity on which the Catholic Church and Catholic imagination and practice are built. The works we have considered here are not works of theology and they are certainly not evangelizing. He is reaching to everyone. The experience of reading John Noonan is of opening more and more to the human in us and all around us, the possibility of a humane world growing with each perception.

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49. *Id.* at 167.

