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Book Review

The Developmental Progress of Free Exercise

*The Lustre of Our Country: The American Experience
of Religious Freedom*

by John T. Noonan, Jr.

University of California Press (1998)

PREFACE

Throughout *The Lustre of Our Country*, Noonan argues forcefully that it is impossible to be neutral in matters of religion. He commands his readers:

You shall conclude that the genealogy, the domestic environment, the educational exposure, the intellectual adventures, the friendships, and the professional life of anyone treating this topic influence the treatment; and you shall suspect that the spiritual life of the writer is relevant as well; and you shall know that no person, man or woman, historian or law professor or constitutional commentator or judge, is neutral in this matter.¹

Thus, any person reading about a religious experience cannot be disinterested. To some degree, the reader will always import her own beliefs and experiences into the text and, in doing so, will create a new text, a text that may contain meaning never originally intended by the author.²

1. JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 357 (1998). Judge Noonan sits on the United States Court of Appeals for the Ninth Circuit.

2. Stanley Fish is perhaps the most well-known proponent of this interpretive position. Known as reception theory or reader-response theory, this position posits that "[i]nterpretive strategies . . . precede and make texts rather than arising from them. Such strategies arise from the interpretive community, and all interpreters belong to one or another of these. . . . In the end, Fish's theory leads to the study of social and institutional power, the power to impose meaning." *CRITICAL THEORY SINCE 1965*, at 524-25 (Hazard Adams & Leroy Searle eds., 1986). See also STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (1980); TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION*

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Reading Noonan's book, I soon realized that the degree to which I would accept his conclusions on the development of religious freedom depended in large part on my own background. My own belief in God roughly coincides with that of Noonan when he writes,

I approach this most difficult and fundamental of subjects not without diffidence and doubt but with the belief that religion is a projection (for who could deny the freight of human desires that every religion has borne?), and that religion is also a response to another, an other who is not a human being, an other who must have an intelligence and a will and so be, analogously, a person. Heart speaks to heart³

I am a member of the Church of Jesus Christ of Latter-day Saints, a Mormon. As the great-great-great-granddaughter of Mormon polygamists, I have heard many stories about my ancestors and what they suffered for their religious beliefs. Although I am removed from the crusade mounted against them by many generations, the check placed on the free exercise of my ancestors troubles me. To them, however difficult and unusual, polygamy was God's law revealed to His covenant people; their right to exercise their beliefs had been divinely appointed. Perhaps if those proscribing polygamy had imaginatively considered the possibility that God had indeed spoken to Joseph Smith,⁴ the result might have been different.

I. INTRODUCTION

In his book, *The Lustre of Our Country*, John Noonan embarks on a journey through "our national experience" of religious freedom.⁵ His chosen text encompasses not only the sixteen words of the First Amendment and the court cases interpreting them, but also his own personal experiences with religious freedom, the writings of philosophers and theologians, and the world of transcendent ideals. Further, he demonstrates how the First Amendment has been utilized by other govern-

85-86 (1983) ("Fish is quite happy to accept that, when you get down to it, there is no 'objective' work of literature there on the seminar table at all. . . . [t]he true writer is the reader.").

3. NOONAN, *supra* note 1, at 1.

4. Joseph Smith was the founder of the Church of Jesus Christ of Latter-day Saints. See RICHARD L. BUSHMAN, *JOSEPH SMITH AND THE BEGINNINGS OF MORMONISM* (1988).

5. NOONAN, *supra* note 1, at 3.

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ments engaged in the writing (or rewriting) of their own tracts on religious freedom. Of great significance to Noonan is the developmental process by which the Second Vatican Council came to incorporate the American ideal of religious liberty into Catholic doctrine.⁶ For Noonan, this process of doctrinal development illustrates not only how change occurs in religious doctrine, it also describes the path that the free exercise of religion is taking in its travel through the minds and hearts of Americans. Significantly, Noonan's method of organizing the book is itself illustrative of this developmental process.

Part II of this Book Review presents the ideas of John Henry Newman who, writing in the nineteenth century, theorized about the development of doctrine in an effort to understand the discrepancies between earlier and later practices in the Catholic Church. Although Noonan refers explicitly to John Henry Newman's work only twice,⁷ Newman's influence is apparent throughout *Lustre* and forms the basis for Noonan's ideas on the development of free exercise. This section also summarizes some of Noonan's personal experiences with the development of Catholic doctrine. Part III illustrates how Noonan, drawing on Newman's theories, has put forward his own approach in explaining the development of free exercise in America. This section begins with the ideals of James Madison and then moves to an analysis of the role institutions and individuals should take in the continuing development of religious freedom. Part III also discusses the organization of *Lustre*, and how Noonan's method of presentation relates to his ideas on developmental change.

II. THE DEVELOPMENT OF DOCTRINE

In 1841, John Henry Newman was on the point of giving up forever his allegiance to the Anglican Church. In his own words, "I was on my death-bed, as regards my membership with the Anglican Church . . ."⁸ He had determined that the church of his birth had veered from the ideals originally con-

6. Noonan also looks briefly at the attempts made by France, Japan, and Russia to enshrine liberty of conscience. *See id.* at 263-328.

7. *See id.* at 5, 203-10.

8. JOHN HENRY NEWMAN, *HISTORY OF MY RELIGIOUS OPINIONS* (2d ed. 1865), reprinted in *NEWMAN: PROSE AND POETRY* 687 (Geoffrey Tillotson ed., Harvard Univ. Press 1970).

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veyed by God to man.⁹ Newman was leaning toward Catholicism, but was still troubled by the discrepancies between the teachings of the primitive church and its present-day counterpart.¹⁰ In his *Essay on the Development of Christian Doctrine* written in 1845, Newman considered whether these changes were the result of the corruption of doctrine or whether they reflected some higher process. Newman theorizes that there are certain underlying, divine ideas that do not change; however, these ideas can only be perceived by imperfect man in fragments of the whole. As various concepts, however, are tested against each other in the crucible of experience, the true, dominant ideas will gradually emerge.¹¹ Newman explains metaphorically, "It is indeed sometimes said that the stream is clearest near the spring. . . . [T]his image . . . does not apply to the history of a philosophy or belief, which on the contrary is more equable, and purer, and stronger when its bed has become deep, and broad, and full" through the passage of years.¹²

In *Lustre*, Noonan, a Catholic, first draws on his own personal experience in observing doctrinal change in his church. Specifically, he recalls his study of the Catholic Church's teachings on the ideal state prior to the second Vatican Council. Although tolerant of those who are not members of the Catholic Church, this early doctrine promotes the use of force in persuading the heretic to turn from wickedness. Thus, in an ideal state, all would be governed by the principles of the Catholic Church, and any heresy would be swiftly stamped out.¹³ Noonan himself initially entertained this belief, partly because

9. See JOHN HENRY NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE 34 (Image Books 1960) (1878) ("[W]hatever history teaches, whatever it omits, whatever it exaggerates or extenuates, whatever it says and unsays, at least the Christianity of history is not Protestantism. If ever there were a safe truth, it is this.").

10. Newman wrote poignantly of his inner turmoil during this time:

I had been deceived greatly once; how could I be sure that I was not deceived a second time? I thought myself right then; how was I to be certain that I was right now? How many years had I thought myself sure of what I now rejected? [H]ow could I ever again have confidence in myself? . . . To be certain is to know that one knows; what inward test had I, that I should not change again, after that I had become a Catholic?

NEWMAN, *supra* note 8, at 748. His poem "The Pillar of the Cloud" written in 1833 expressed a prayer for the future; he wrote, "LEAD, Kindly Light amid the encircling gloom, / Lead Thou me on!" NEWMAN, *supra* note 8, at 807.

11. See NOONAN, *supra* note 1, at 5.

12. NEWMAN, *supra* note 9, at 63.

13. See NOONAN, *supra* note 1, at 27.

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it had history on its side and partly because consideration of other alternatives implied that the Catholic Church had made a mistake.¹⁴ After further study, Noonan learned of other doctrinal changes in the Catholic Church, for example, its views on usury. He saw for himself the natural progression of the church's position on usury until it became disengaged "from what [was] foreign and temporary."¹⁵ After this experience, he was ready to accept the work promoted by an American Jesuit and scholar, John Courtney Murray I, who proposed nothing short of a revolution in the Catholic doctrine of liberty of conscience.¹⁶

Inspired in part by the free exercise of religion in the United States, Murray argued that freedom of conscience was part of God's plan for the church. While at first rebuffed and censored, his ideas gradually found a place in the minds of other prominent Catholics.¹⁷ The Second Vatican Council issued a Declaration on Religious Freedom beginning with the words "*Dignitatis humanae personae*."¹⁸ The Declaration proclaimed that the right to religious freedom was "founded in the very dignity of the human person as it is known by the revealed word of God and by reason itself."¹⁹ Newman's model of the development of doctrine, therefore, had been dramatically illustrated.

III. THE DEVELOPMENT OF FREE EXERCISE

Drawing on his educational experiences, Noonan posits in *Lustre* that the idea of free exercise itself is changing according to Newman's model for the development of doctrine. Underlying the seemingly contradictory approaches to religious freedom are essential truths that will eventually be recognized as such through the gradual elimination of ideas that conflict with core principles.²⁰ Noonan's own beliefs on religion and on the origin of free exercise lie at the heart of this comparison. Although he occasionally refers to free exercise as the great

14. See *id.* at 29.

15. NEWMAN, *supra* note 9, at 63; see also NOONAN, *supra* note 1, at 30-31.

16. See NOONAN, *supra* note 1, at 331-33.

17. See *id.*

18. *Id.* at 348-49 ("of the dignity of the human person").

19. *Id.* at 349 (quoting Second Vatican Council, *Dignitatis humanae personae*, § 2, ACTA SYNODALIA, 4:7).

20. See *id.* at 5.

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"American invention,"²¹ Noonan more often holds to the idea that religious freedom has deep roots founded in the sacred link between God and humankind. In that relationship, God has commanded man to worship and obey Him rather than man.²² The doctrine of free exercise recognizes the supremacy of this relationship and gives to each individual a sphere in which to follow his or her conscience without fear of state incursion.²³

This approach to free exercise unabashedly takes account of faith.²⁴ Noonan asserts that there are essentially two approaches to religion: "Religion is either the worship of a being distinct from the worshipers who is God for the worshipers, or God is the projection of personal and collective need."²⁵ In order to provide religious freedom with a secure footing, it is necessary to recognize that "[t]here is a heart not known, responding to our own."²⁶ Noonan argues that in order to fully respect free exercise, an individual confronted with the task of pronouncing judgment on religious freedom must suspend disbelief and entertain the possibility that God directly intervenes in the life of man.²⁷

A. James Madison's Ideal

Under the Newman model of doctrinal development,

when some great enunciation, whether true or false, about human nature, or present good, or government, or duty, or religion is carried forward into the public throng of men and draws attention, then it is not merely received passively in this or that form into many minds, but it becomes an active principle within them, leading them to an ever new contemplation of itself, to an application of it in various directions, and a propagation of it on every side.²⁸

In modern history, James Madison was the individual destined to make the "great enunciation" on free exercise that has

21. *Id.* at 2.

22. *See id.* at 43. Noonan also argues that the ancient, pagan notion of conscience converged with the Christian tradition. *See id.* at 44.

23. *See id.* at 89.

24. *See id.* at 209.

25. *Id.* at 1.

26. *Id.* at 2.

27. *See id.* at 172-76.

28. NEWMAN, *supra* note 9, at 60.

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become a living principle in American society. For Noonan, Madison's ideal became the vehicle for a new formulation of the ancient concepts of supremacy of conscience. First, Madison understood that tolerance alone would not guarantee religious freedom; religion must be allowed to be practiced fully and freely.²⁹ Furthermore, Madison understood this right to free exercise to be " 'a *natural* and absolute right.' "³⁰ This right could only be guaranteed if there were no governmental interference with the obligation of conscience, that is, no establishment of religion. In particular, Noonan highlights the radical nature of Madison's ideas which, if taken to their logical conclusion, would create a zone in which the individual "responds to the voice of God, a zone beyond political authority."³¹

According to Noonan, Madison's personal beliefs about God brought him to his conclusions about freedom of religion. He writes, "[t]o suppose that [Madison] had only a political religion because he did not publicly display his piety is to miss the genius of the man: his modesty."³² Noonan argues from the evidence, scarce as it may be, that Madison was indeed a believer and was motivated by the "voice of another, a communication, a command."³³ Because Madison believed in divine intervention, he was able to convincingly assert that "[a] human being's relationship with God is 'excepted from the grant on which all political authority is founded.' "³⁴ Noonan asserts,

The ultimate fact—the ultimate paradox if one likes—is that for the Father of Free Exercise the rightness of the doctrine is rooted in his own faith, a faith conventional in its day but for all that palpably alive, a faith stupendous in modern eyes, the faith that God in us speaks to us.³⁵

Although "[t]he great ambiguity of the First Amendment opens wide,"³⁶ the sixteen words that form the constitutional embodiment of Madison's ideal have provided room for the further development and implementation of free exercise. In mak-

29. See NOONAN, *supra* note 1, at 69.

30. *Id.* at 70 (quoting James Madison, Autobiographical Notes (on file with the Library of Congress: William C. Rives Papers)).

31. *Id.* at 89.

32. *Id.* at 88.

33. *Id.* at 89.

34. *Id.* at 88.

35. *Id.* at 89.

36. *Id.* at 82.

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ing this assertion, Noonan may have had in mind Newman's observation on the ambiguities contained in the Gospel. Newman wrote,

[The Gospel's] half sentences, its overflowings of language, admit of development; they have a life in them which shows itself in progress; a truth, which has the token of consistency; a reality, which is fruitful in resources; a depth, which extends into mystery: for they are representations of what is actual, and has a definite location and necessary bearings and a meaning in the great system of things, and a harmony in what it is, and a compatibility in what it involves.³⁷

Therefore, according to Noonan's application of Newman's model, Madison's radical ideals will continue to develop as they are implemented and understood by others.

B. Institutional Authority in the Developmental Process

While not explicitly discussed in *Lustre*, Noonan also seems to have considered the implications of Newman's reflections on the role played by the Catholic Church in doctrinal development. Newman theorized that because God appointed this mode of development for His doctrine, it followed that He must also have appointed

an external authority to decide upon them [the developments of doctrine], thereby separating them from the mass of mere human speculation, extravagance, corruption, and error, in and out of which they grow. This is the doctrine of infallibility of the Church; for by infallibility I suppose is meant the power of deciding whether this, that, and a third, and any number of theological or ethical statements are true.³⁸

Thus, under the Newman model, the Catholic Church makes the final determination as to the truth or error of any particular change in doctrine during the process of development. If free exercise, as Noonan asserts, develops in the same way as doctrine, where is the corresponding "external authority," and how does it operate? Although Noonan does not make direct reference to Newman's concept of an "external authority," Noonan appears to have considered this issue.

37. JOHN HENRY NEWMAN, THE THEORY OF DEVELOPMENTS IN RELIGIOUS DOCTRINE (1843), *reprinted in* NEWMAN THE THEOLOGIAN: A READER 127 (Ian Ker ed., Univ. Notre Dame Press 1990).

38. NEWMAN, *supra* note 9, at 97.

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At first, Noonan's response to this question is that the Supreme Court plays the role of "external authority." He observes, "The power to interpret is the power to make the Constitution what the courts want regardless of the expressed will of the people Actual power to change a decision, 99 percent of the time, rests only with the courts. That power is normally of the greatest practical importance" ³⁹ Problems may arise, however, for free exercise in a system where a largely secular judiciary has the last word on what constitutes the valid development of Madison's ideal.

One of these problems is illustrated by what is known as "Durkheim's dilemma." Emile Durkheim theorized that "[s]ociety . . . worships itself and must worship itself to survive as an organic society." ⁴⁰ Under his theory, religion "is a unified system of beliefs and practices relating to sacred things, that is to say, things set apart and forbidden." ⁴¹ The dilemma is that "[i]f religion is defined as an expression of the national community, and if that community must create its own religion in order to exist, must the community not establish that religion; and if the community establishes its religion, how can the exercise of religion be free?" ⁴²

According to Durkheim, society and its organs, including the Supreme Court, will always establish self-worship to the detriment of individual exercise of conscience. ⁴³ This model, if correct, would effectively displace Newman's theory; it is impossible for the Supreme Court to function as an external authority on the development of free exercise because, as an organ of the state, it would always be seeking to establish an atheistic, functional religion of self-worship instead of seeking to vindicate the free exercise rights of individuals.

Noonan illustrates three areas of the law where it appears at first impression that Durkheim is correct: taxation, military manpower, and the judiciary. ⁴⁴ These three areas have repeatedly been assessed as untouchable and "sacred" by the courts. In the case of the judiciary, because the courts have the last word in deciding the meaning of the First Amendment, they

39. NOONAN, *supra* note 1, at 227.

40. *Id.* at 214.

41. *Id.* at 213.

42. *Id.* at 215.

43. *See id.* at 214.

44. *See id.* at 213-37.

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have “unselfconsciously place[d] themselves above any church or creed.”⁴⁵

Further, in property disputes between splintering congregations, the courts will have to make the final decision about who truly owns the property. In effect, courts will be determining which of the two fragments of a previously whole church is the “true church.”⁴⁶ *Shelley v. Kraemer*⁴⁷ laid the groundwork for the argument that making this kind of decision is in itself state action, and thus, for First Amendment purposes, would constitute the proscribed establishment of religion.⁴⁸

C. The Individual in the Developmental Process

In light of Durkheim's dilemma—that is, if Durkheim is right and society of necessity establishes itself as the national religion—how will free exercise be able to continue its course of development? Here, Noonan tacitly adapts Newman's model to fit a democracy in which each individual may be experiencing religion and the transcendent in a different way. In Noonan's work, Newman's requisite “external authority” becomes the individual voices of the nation's people instead of the authoritarian voice of a reified institution, such as that of the Supreme Court. Specifically, Noonan argues that individuals convinced that the existing rule of law does not adequately express fundamental truth will, either as martyrs or crusaders, intervene in government and contribute to the development of the free exercise ideal. In reaching this conclusion, Noonan likely had in mind the events of the Second Vatican Council, at which the Catholic Church itself rejected its role as the sole “external authority” on deciding matters of faith and conscience. Only by divesting itself of authority to make final pronouncements on matters of conscience did the Catholic Church recognize the supremacy of the relationship between God and the individual.⁴⁹ While Noonan would not wish to divest the Supreme Court of its authority to decide certain matters of religious freedom, he argues that it should not and will not be the sole voice on free exercise.

45. *Id.* at 227.

46. *Id.* at 228.

47. 334 U.S. 1 (1948).

48. See NOONAN, *supra* note 1, at 229.

49. See *supra* Part II.

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Noonan's method of presentation further illustrates the position that individual voices play a vital role in the developmental process. Instead of using a straightforward, legalistic style, Noonan incorporates a variety of genres and techniques into his book. For example, he presents the pre-Revolution history of religious freedom in catechetical form.⁵⁰ He imaginatively analyzes Alexis de Tocqueville's observations on America by inserting an unpublished account (actually a cento of Alexis de Tocqueville's writings) "written" by his younger sister, Angélique de Tocqueville.⁵¹ He creates the character Judge Simple, who first learns about judicial precedent through discussions with his law clerks, Harvardman, Boaltman, and Yalewoman.⁵² The judge then turns to his former law partners at Fish, Frye & Ketchum.⁵³

The fictitious dialogue ends with a discussion between Judge Simple and three graduate students, Lucinda Logic, Cleopatra Sens, and, significantly, John Henry, who is sometimes called Newman.⁵⁴ In this way, Noonan presents the voices and viewpoints of other individuals. He declines to provide any single and final answer to the questions surrounding religious freedom; in essence, he refuses to himself become the "external authority" on free exercise. Rather, he lets the voices of others who have been engaged in the development of religious freedom speak through him.

Central to Noonan's approach to the development of free exercise is the belief that religious individuals and movements will be able to effectively influence government to bring about change. For Noonan, the brightest example of what religious crusaders can do for the development of freedom is found in the example of the abolitionists. These men and women, through the developmental process, had come to understand God's will in a way that was radically different from their neighbors. Their movement was characterized by "a heavily clerical leadership and organized church support . . . ; an intense religious conviction that slavery was a national sin and an unrestrained use of this theological category to describe and denounce the

50. See NOONAN, *supra* note 1, at 43-58.

51. See *id.* at 95-115.

52. See *id.* at 181-96.

53. See *id.* at 196-203.

54. See *id.* at 203-10.

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practice of slaveholding.”⁵⁵ They came to understand that the words “all men are created equal” did indeed apply to all. Largely through their efforts and through the effect of their ideas, slavery was ended. Later, additional religious crusaders, like Martin Luther King, Jr., through their example and contribution to the development of ideas would continue to move the law closer to a true ideal of equality.

For free exercise to continue to develop in this manner, religion must be allowed to intervene in government, and government must give room to this potentially subversive force for change. According to Noonan “the free exercise of religion can be divisive and dangerous to established institutions and customary ways as well as beneficent for believers and empowering for the forgotten [T]he price of our constitutional liberty is acceptance of the precarious condition.”⁵⁶ The old imperative that there should be a “wall of separation” between religion and state yields before this “precarious condition”⁵⁷ necessary for the growth of religious freedom. In its place, Noonan suggests that the appropriate metaphor for the barrier between church and state is a semiconductor, a conduit that relays “a small, controlled amount of electricity.”⁵⁸ He writes, “You don’t want the full blast of religion on government But a government without religion is like a computer without electricity. A government needs the charge, in small amounts.”⁵⁹

IV. CONCLUSION

Under Noonan’s model, the ideal of free exercise has its roots in our sacred relationship with the divine. James Madison most completely articulated this ideal, and it was he who set in motion the great American experiment with religious freedom that has become an example to the world. The continued intervention of religious individuals in the governmental process will ensure free exercise’s continuing development. This model of the developmental process of free exercise relies heavily on Noonan’s personal experiences and study of theol-

55. *Id.* at 250.

56. *Id.* at 358.

57. *Id.*

58. *Id.* at 210.

59. *Id.*

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ogy. While some may regard this as a weakness, by using this method, Noonan has created a text that speaks to the reader not only on an intellectual plane but on a personal level as well.

Charlene Davis Luke