

## Reviews

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# Oracle of Religious Liberty

JOHN T. NOONAN, JR.

THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM  
UNIVERSITY OF CALIFORNIA PRESS 1998

John Witte, Jr.

**I**N AN IMPRESSIVE SERIES of books, articles, briefs, and judicial opinions spanning nearly half a century, John T. Noonan, Jr. has established himself as one of the great oracles of religious liberty in twentieth-century America.<sup>1</sup> *The Lustre of Our Country* is both a confirmation and a proclamation of the depth of his conviction and erudition on this cardinal legal and theological theme.

The title of this volume is plucked from what Noonan considers one of the “Ur-texts” of American religious liberty – James Madison’s famous *Memorial and Remonstrance Against Religious Assessments* of 1785, the pamphlet that finally broke the Anglican establishment policies of revolutionary Virginia and laid part of the foundation for the American constitutional experiment in

granting religious freedom to all (pp. 72-74).

The inspiration for this volume comes through clearly in Noonan’s Introduction: “One might, but should not, attempt to conceal the experiences that color one’s own conception of the issues. Let each one addressing this theme say where he or she comes from, and goes. I grew up in a church that formally denied free exercise and live now in the same church that has come to champion it. This whole book is a reflection on the experience” (p. 3).



The beginning and end of this reflection are predictable enough. In a long opening chapter, Noonan takes us into his world as a young Catholic lad in Boston. Noonan has never

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<sup>1</sup> See Robert Rodes, *An Overview of the Scholarship in Law and Religion of Judge John T. Noonan, Jr.*, 11 J.L. & REL. 533 (1995-96) and Kevin Starr, *Judge John T. Noonan, Jr.: A Brief Biography*, 11 J.L. & REL. 151 (1994-95).

been shy about lifting his professorial or judicial “mask,” but this chapter offers his fullest self-portrait in print. Born in 1926, Noonan was reared in a devout Catholic family, with a particularly pious mother. He felt acutely the tense Protestant-Catholic-Jewish pluralism of Boston politics and public schools in the inter-War period. He viewed, with some quiet skepticism, the political machinations of the Catholic episcopacy over contraception and the lottery. He read and studied voraciously. In 1942, he followed in his father’s steps by attending Harvard College, where he studied literature, economics, and philosophy. In 1946, he matriculated at St. John’s College, Cambridge, where he read history and philosophy and conversed with T.S. Eliot and George Santayana. While in England, he was much taken with the great churches, artwork, and culture that Christianity had wrought. He ultimately went to Rome where he met Pope Pius IX. “The European experience,” Noonan writes, “cumulatively confirmed what I already felt in my bones, that Catholicism was the largest intellectual force in my life, yet I knew so little about it” (p. 25).

After his graduate studies at Catholic University, Noonan knew more about Catholicism than most. He wrote a brilliant dissertation on the scholastic analysis of usury – showing what would become his trademark gift for tracing the development of complex legal and theological themes from their earliest biblical sources to the most recent papal encyclicals.<sup>2</sup> It was his more avocational pursuit of questions of religious liberty, however, that proved even more critical. Noonan was drawn with increasing alacrity into the emerging debate among American Catholics, catalyzed by John Courtney Murray, about Rome’s position on religious liberty.

The Catholic episcopacy of the day had

grave suspicions about the democratic and human rights theories born of Western liberalism. Liberal teachings on liberties, rights, and separation of church and state stood in tension with many of the Church’s teachings on natural law, the common good, and subsidiarity. The Church’s increasing intolerance of liberal themes during the nineteenth century had given way to outright hostility in the blistering *Syllabus of Errors* issued by the papacy in 1864. While in subsequent decades – particularly after issuing the encyclicals *Rerum Novarum* (1891) and *Quadragesimo Anno* (1934) – the papacy tempered its views somewhat on social and economic rights, it remained fundamentally suspicious of the robust liberalism of Western Europe and America in the post-War period.

John Courtney Murray, S.J., courted charges of infamy, if not excommunication, by arguing against the Church’s official position (pp. 26-30, 331-337). The “liberal” doctrines of human rights, religious freedom, and separation of church and state, Murray argued, were not necessarily inconsistent with Catholic tradition. Earlier papal statements against such doctrines, in Murray’s view, “must be seen in context. They spoke against the background of an anticlerical politics. They did not speak for all time” (quoted, p. 29).

Initially, Noonan was unconvinced by Murray’s arguments. He argued with his professors and peers at Catholic University that the Catholic tradition firmly opposed such views. But then Noonan spent an afternoon with Murray himself. While Noonan left still doubtful, this conversation haunted him throughout his career, and indeed haunts this book:

I felt the attraction of Murray’s position without being persuaded of it. I put the question aside as not a practical one; after all, every Catholic accepted American democracy and

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<sup>2</sup> See John T. Noonan, Jr., *THE SCHOLASTIC ANALYSIS OF USURY* (1957).

liberty of religion today. But in the back of my mind I was aware that this practical comfort implicated a much larger question, the relation of history to the teachings of the Church, the question to which I have returned again and again. (p. 29)

Noonan puts the question aside for a time in this book as well. In the final chapter, however, he returns to it to tell the familiar story of Murray's conciliar triumph. Under the inspiration of Murray, Jacques Maritain, and others, the Second Vatican Council (1962-1965) transformed the Catholic Church's doctrine of religious liberty. In a series of sweeping new doctrinal statements, capped by *Dignitatus Humanae* (1965), the Council came to endorse many of the very same human rights and democratic principles that it had so hotly spurned less than a century before. First, the Council endorsed human rights and liberties. Every person, it taught, is created by God with "dignity, intelligence and free will ... and has rights flowing directly and simultaneously from his very nature."<sup>3</sup> It emphasized the religious rights of conscience, worship, assembly, and education, calling them the "first rights" of any civic order. It also stressed the need to balance individual and associational rights, particularly those involving church, family, and school. Second, as a corollary, the Council advocated limited constitutional government, disestablishment of religion, and the separation of church and state. The vast pluralism of religions and cultures, and the inherent dangers in state endorsement of any religion to the exclusion of others, rendered mandatory such democratic forms of government. Noonan tells the story of the Second Vatican Council with all the passion and perspicacity of a jurist, theologian, and journalist at once (pp. 331-353). And, in telling this story, he underscores one of

the central points of his work in this vital field: that, to be real and enduring, religious freedom must not only be guaranteed by civil law but also be grounded by religious doctrine.



Between these two ornate book ends (Catholic autobiography and conciliar reform) the reader might have expected to find a judicious treatment of the development of religious freedom in the theology and canon law of the Roman Catholic Church. This would have been of a piece with Noonan's exquisite book-length tours on usury, bribery, contraception, marriage, and divorce.<sup>4</sup> And it would have been a welcome addition to the literature on the history of religious liberty in the West. Some of this history does sneak into the book, in a brief overview chapter and in passages peppered throughout on liberty of conscience and liberty of the church as interpreted by Augustine, Aquinas, and sundry popes (pp. 43-58, 268-278, 287-288).

But the *Lustre* reader is hardly prepared for the multi-disciplinary and multi-media tour of American religious liberty that Noonan places between these bookends. The eleven chapters at the heart of the book shift from catechism to cento, biography to parable, parody to prophecy to tell the American story of religious freedom. Readers of Noonan's case-book, *Believers and the Powers That Are* (1987), will recognize a bit of this material and will also know of Noonan's hearty appetite for dangling the delicious intellectual fragment, note, and aphorism. But in this book, Noonan takes new and bold poetic license. He shifts from voice to voice, from medium to medium, in a way that every chapter becomes an exciting new adventure not only because of its con-

3 *Pacem in Terris* ¶¶ 9-10 (1963), reprinted in VATICAN COUNCIL II: THE VATICAN AND THE POSTCONCILIAR DOCUMENTS (Austin Flannery, ed. 1986).

4 See the list of titles in Rodes, *supra* note 1.

tent but also because of its style.

James Madison is one of Noonan's heroes, and he devotes a long chapter to the story of how this young Virginia boy of Anglican stock and Evangelical sympathy eventually became America's great prophet of religious liberty. Madison's biography is well known, and Noonan recounts it faithfully and forcefully. Though neither a lawyer nor a theologian, Madison was the first to reach the cardinal legal and theological "insight" that liberty of conscience, freedom of exercise, and disestablishment of religion must be combined. Madison defended this insight most famously in his *Memorial and Remonstrance* of 1785, and worked it into the fabric of both the state and federal constitutions (pp. 61-91). Buoyed by his own "surprise" in discovering Madison (pp. 3-4), Noonan sometimes gives his hero a bit too much credit: Madison was not the "chief architect" of the Constitution's prohibition on religious test oaths (pp. 75-76); Charles Pinckney, the author of what would become Article VI was at least as important. Madison was not "the spokesman for religious freedom in the Congress," nor was the First Amendment "the triumph" of his views (pp. 77-80; but cf. pp. 3-4). Madison's drafts of the religious clauses did not prevail in the First Congress, and what emerged is more aptly described as a composite of the ideals proffered by Madison as well as Charles Livermore, Fisher Ames, Thomas Tucker, Elias Boundinot, and Charles Carroll.<sup>5</sup> But such picayune points aside, Madison was certainly a most powerful American prophet of religious liberty.

In two subsequent chapters, Noonan shows the role of religion as a formidable force for both political and social reform in the first century of the American experiment – particularly in addressing America's greatest blight, the institution of slavery. Much of chapter 4 is

a quotation from a letter of one Angélique de Tocqueville, "the keen-eyed younger sister of the famous Alexis" (p. 95). Her report on religion and democracy in America proves even more penetrating and prescient than that of her brother in describing how Christianity has formed and will reform the common law and public life of America, and how latent tensions in Christianity are exploited in the struggles between pro- and anti-slavery camps. A subsequent chapter focuses on Theodore Parker's brilliant religious crusade for abolition, which anticipates later discussions of the civil rights leadership (pp. 129-137, 256-258). Even specialists will be surprised by Angélique's compelling and comprehensive narrative – so surprised, they might be prompted to search for her works, a bit embarrassed that they knew nothing of her. Only when they walk into the library will they discover that Noonan has been pulling their leg. The letter is a cento. Angélique is an efficient fictional narrator whom Noonan uses to tell afresh the nineteenth century story of religion and politics in America.

After an exquisite and unprecedented case study of the growth, conviction, trial, and multiple appeals of the "I Am" movement led by Edna Ballard (pp. 139-176), Noonan turns to the broader themes of First Amendment law in the twentieth century. A long chapter on "The Pilgrim's Process" puts Noonan in fictional dialogue with various trios of experts on modern First Amendment law – Boaltman, Harvardman, Yalewoman; Lucinda Logic, Cleopatra Sens, and John Henry [Newman]; and Fish, Frye & Ketchum ("Fish, Ketchum & Frye," would have been better, "but seniority was more important than logic" in establishing this law firm, says Noonan, scoring a clever point about the roles of logic and tradition in establishment law, p. 196).

Noonan, playing Simon Simple on this

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<sup>5</sup> See sources in my *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* (1999).

Bunyan-like pilgrimage (see p. 203), uses this dialogue to recount critically the familiar story of the Supreme Court's application of the First Amendment. Noonan's interlocutors expose many of the tensions in the Court's modern cases – between deference and neutral principles approaches to intrachurch disputes, between accommodationist and separationist interpretations of the disestablishment clause, between compelling state interest and neutrality approaches to the free exercise clause. With wry understatement, Simon Simple declares: "I see the Supreme Court is an inconsistent guide on my pilgrimage" (p. 192).

Along the way, Noonan gets in some hilarious jabs. For example, in explaining the Court's tortured logic in support of tax exemption of church property, Noonan writes: "There's an echo of Lutheran theology in the court. The justification of the exemption does not come from good works but from faith" (p. 194). He praises "the mother of all religious cases, *Cantwell*, as in 'cant', 'to sing in church' or 'to speak solemnly to gain a reputation for goodness that is unfounded in fact'" (p. 207). He contrasts the sound as much as the substance of *Lamb's Chapel* and *Wolf* for the cause of religious freedom: "Nomen, omen, as my old Latin teacher used to say" (pp. 196-203, 206-207).

In the voice of the "shaggy" John Henry – a dig at the always immaculately primed nineteenth-century Cardinal John Henry Newman – Noonan gets to the heart of his appraisal of the American record on religious liberty. The fictional Newman utters a profound line, lifted from the Cardinal's own *Development of Doctrine* (1846):

The development then of an idea is not like an investigation worked out on paper, in which each successive advance is pure evolution from a foregoing, but it is carried on and through and by means of communities of men and their leaders and guides; and it employs their minds as its instruments and it depends upon them

while it uses them. ... It is the warfare of ideas under their varying aspects striving for the mastery. (quoted, p. 209)

While perhaps a bit too "patriarchal" and bellicose for his interlocutors (pp. 209-210), Newman's statement underscores the power of the American experiment, and Noonan's appreciation for the same, despite its occasional sputterings.

Constitutional litigation over religion – however awkward, meandering, and strained in logic – is much better than religious warfare, Noonan concludes. This method, anchored in guarantees of religious freedom for all, is the best way for preserving a community. It is far better to have the Supreme Court, properly bound by constitutional restraints of standing and due process, serve as our "final constitutional theologian" than to settle such matters through force of arms (pp. 226-231). Lest modern readers not see the point, Noonan gives a very modern, and very Californian, explanation:

The Constitution is a semiconductor between religion and government. ... A conductor, like gold or copper, transmits electricity without resistance; you get more electricity than you want. A nonconductor, like plastic, won't transmit at all; you have no electricity. A semiconductor, like silicon, passes on small, controlled amounts of electricity which enables you to have exactly as much power as you need. You don't want the full blast of religion on government; that's too much light or too much heat. But a government without religion is like a computer without electricity. A government needs the charge in small amounts. The constitutional provision can work admirably as a semiconductor. Free Exercise [is] the silicon of our society. (p. 210)

It is this unique understanding of religion and politics, of church and state, of faith and freedom, of conscience and law that America has slowly developed over more than two centuries of experience. Its development has not

been without missteps and retreats, and not without its victims and villains. But, on the whole, the American record of religious liberty has served nobly in “reconciling religious rights and State authority ... without belligerence or bloodshed.”<sup>6</sup>

This unique American understanding of religious liberty has been gradually projected into the world in the course of the twentieth century – onto France after its revolutionary reversions in the early nineteenth century (pp. 265-284), onto Japan after its imperialistic pretensions in World War II (pp. 285-298), onto Russia in the final course of the Cold War and its aftermath (pp. 305-328), onto the Roman Catholic Church in the Second Vatican Council (pp. 331-352), and one might add onto many international and regional human rights instruments of the past two decades.<sup>7</sup>

Noonan warns against both undue timidity and undue triumphalism in assessing the American experiment and experience in reli-

gious liberty. “Free exercise – let us as Americans assert it – is an American invention. How foolish it would be to let a false modesty, a nervous fear of chauvinism, obscure the reality. ... Never before 1791 was there a tablet of the law, a legal text guaranteeing to all a freedom from religious oppression by the national legislature” (p. 2). Readers of the Edict of Milan (313) or the Union of Utrecht (1579) might wince a bit at this, but this powerful statement bears close scrutiny. Noonan returns to this insight in his final chapter: “It has always seemed to me presumptuous for America to be a model for the nations, to be almost as it were a second Israel. The Messianism that has characterized some Russians writing about Russia has always appeared to me to be a delusion, not to be mimicked by Americans writing about America. But ... the United States has had a light to contribute on the special subject of religious liberty” (p. 331). And John T. Noonan, Jr. has been a noble light-bearer. 

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6 See John T. Noonan, Jr., *The Tensions AND the Ideals: Religion Human Rights in the United States*, 10 EMORY INT'L L. REV. 183-193, 188 (1996).

7 See a good collection in RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS (T. Stahnke & J. Paul Martin, eds. 1998).