

The Religious Imagination and Hearing the “Other”:
Judge John T. Noonan, Catholic Social Teaching, and Immigration

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They [aliens] are second class people. No doubt for some purposes this characterization is the harsh truth. Since the abolition of slavery aliens are the only adults subject to treatment as second class people in the United States.

Judge John T. Noonan, Jr.,
dissenting in *Price v. Immigration
and Naturalization Service*, 941 F.
2d 878, 885 (1991)

For her part, the Church, like the Good Samaritan, feels it her duty to be close to the illegal immigrant and refugee, contemporary icon of the despoiled traveler, beaten and abandoned by the side of the road to Jericho.

Pope John Paul II, “Faith Works
Through Charity,” World Migration
Day message, August 21, 1996

“We inhabit a nomos—a normative universe,” wrote the late Robert Cover, a world of right and wrong, “held together by the force of interpretive commitments,” commitments which in turn shape legal meanings.¹ Illustrative, according to Cover, was the amicus brief submitted by Mennonites in *Bob Jones University v. U. S.*, a U .S. Supreme Court case that raised the issue of the university’s tax exempt status in the face of its racial discriminatory policies. The brief, affirming the principle of religious liberty,

¹ Robert Cover, “Nomos and Narrative,” in Martha Minow, Michael Ryan and Austin Sarat, eds., *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1995), pp. 95, 98-99.

reflected what Cover called “the Anabaptist nomos”²; he wrote, “The Mennonite narratives, whether the quasi-sacred tales of martyrs or the more recent stories of conscientious objectors, help to create the identity of the believer and to establish the central commitment from which any law—and especially any organic law—of the state will be addressed.”³

Judge John T. Noonan, Jr., Senior Judge of the Ninth Circuit Court of Appeals, inhabits a nomos, embedded as he is in his faith tradition, the Roman Catholic Church; the Catholic nomos constitutes him and his perspectives. A scholar and prolific writer, one need only read the titles of his books to recognize this, titles that include *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (1965), *The Morality of Abortion* (1970) and *Canons and Canonists in Context* (1997). Among his many articles are, “American Catholics and the Intellectual Life”⁴ and “The Catholic Justices of the United States Supreme Court,”⁵ and, when not on the bench, he serves as a trustee of The Institute for Advanced Catholic Studies. Institutions which have granted him an honorary degree include the University of Notre Dame, Holy Cross College, and his alma mater, the Catholic University of America from which he received a doctorate degree.

Not only is Noonan situated in the Catholic Church, but he has lived his professional life in the law, as practicing attorney, law professor and judge. His study of the religion clauses of the U. S. Constitution has produced *The Lustre of Our Country: The American Experience of Religious Freedom* (1998) and a casebook, *Religious*

² Ibid., pp. 122-23.

³ Ibid., p. 124.

⁴ 31 *Cross Currents* 433-36 (1982).

⁵ 67 *Catholic Historical Review* 369-85 (1981).

Freedom (2001). Legal historians know him for his book, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (1976).

When President Reagan appointed the Berkeley law professor to the Ninth Circuit in 1985, a *Newsweek* article described him as “uniquely gifted as a moralist, historian and lawyer . . . [who] challenges American jurisprudence with a rare humanistic vision.”⁶

Those who thought that he would be a predictably conservative judge were disappointed. Norman Dorsen, president of the American Civil Liberties Union from 1976 to 1991, has noted that his Harvard Law School classmate, while holding to the Catholic Church’s teaching on abortion, surprised some with his support for death row prisoners seeking stays of execution and more hearings and his empathy for immigrants, the subject of this paper.⁷ He has been described simply as “Catholic, not a Republican.”⁸

Noonan’s Catholicism became an issue in an abortion case, *Feminist Women’s Health Center v. Codispoti* 69 F. 3d 399 (1995) in which appellants moved that Judge Noonan recuse himself because “his fervently-held religious beliefs would compromise his ability to apply the law.”⁹ He refused, asserting that the request effectively amounted to imposing a religious test for a federal office which is prohibited under Article VI of the U. S. Constitution. If such a test were accepted, he pointed out, then many others would be disqualified from hearing abortion cases, among them Orthodox Jews and Mormons.¹⁰

The appellants’ motion assumes that judicial decision-making can and should be insulated from the judge’s religious convictions, and, in fact, the absence of religious

⁶ Quoted in Norman Dorsen, “John T. Noonan, Jr.: Renaissance Man in the Catholic Tradition,” *Notre Dame Law Review* 76 (2001), p. 843.

⁷ *Ibid.*, pp. 845-46.

⁸ Stanley Hauerwas and Richard Church, “The Art of Description: How John T. Noonan Reasons,” *Notre Dame Law Review* 76 (2001), p. 858.

⁹ *Feminist Women’s Health Center v. Codispoti*, 69 F. 3d 399, 400 (1995).

¹⁰ *Ibid.*, at 400-401.

convictions as justifications in judicial opinions might lead to the conclusion that the separation does occur. But does it really? Kent Greenawalt thinks not. In his book, *Private Consciences and Public Reasons*, he writes that it is very difficult for individuals “in their internal, silent deliberations, to exclude their religious values when making decisions to which those values relate.”¹¹ And judges are no exception.¹²

To plumb the relationship between a judge’s religious convictions and her opinions and rulings might be a fool’s errand, not because it is irrelevant, but because the search will never uncover a linear causality providing the security of exhaustive explanation. Nor should such a linear relationship exist. For a judge to state explicitly that her decision was shaped by religious convictions would fly in the face of our traditional expectation for law, namely that decisions should not turn on judges’ personalities, otherwise the law would be arbitrary and decisions unpredictable. Additionally, religious faith, especially in a post- 9/11 world, makes us uneasy because it can lead to ultimatums which rend the social fabric. Religion too frequently is not benign; its rigid and demonizing categorizations can kill, witness the Crusades, the Inquisition or jihad.

What makes us uneasy about the difference between religious faith and other personal attributes that judges bring to their craft is that faith places them under obligation to something outside themselves and even the state. I am not morally obligated to advance my social class, or the cause of those who share my ethnicity or level of education, typical characteristics political scientists examine to explain judicial decisions. I may end up advancing those interests, but it will not be, most likely, out of

¹¹ Kent Greenawalt, *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995), p. 138.

¹² *Ibid.*, p. 144.

fidelity to God. I am not under moral obligation to my demographics; if I am a person of faith I am under moral obligation to my God.

Not all definitions of religion include reference to God. In his study of the religious convictions of judges, Mark Modak-Truran employs Schubert Ogden's definition of religion: "the primary form of culture in terms of which we human beings explicitly ask and answer the existential question of the meaning of ultimate reality for us."¹³ Put another way, religion is a "comprehensive claim or conviction about human authenticity."¹⁴ Such a definition then includes atheists, capitalists and Marxists.

But this is not Judge Noonan's definition, for, although religion does reflect human fears and desires, it is ultimately, for Noonan, a response to transcendence. In a lecture at the University of Virginia Law School, he defined religion as "the worship of God," a projection of human fears and "a response to another, or other who is not a human being . . ."¹⁵ Among other things, he noted, religion is "a relationship to God," it is "living communication between believer and God."¹⁶ He asserted, "Religion is ineradicable because of this other and greater to whom we relate and respond."¹⁷

Admittedly any reflections about the relationship between judges' decisions and their personal religious convictions can only be speculative at best, especially when so few opinions explicitly refer to the religious convictions of their authors, but Noonan himself invites speculation about the sources of judicial opinions in his book, *Persons and Masks of the Law*.

¹³ Mark Modak-Truran, "The Religious Dimension of Judicial Decision-Making and the De Facto Disestablishment," *Marquette Law Review* 81 (1998), p. 262.

¹⁴ *Ibid.*, p. 263.

¹⁵ John T. Noonan, Jr., "Religious Liberty at Stake," *Virginia Law Review* 84 (1998), p. 460.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

In it Noonan criticizes legal positivism for objectifying law, giving it a life of its own apart from the lawyers, judges and legislators who breathe life into it. Giving law a life of its own apart from the individuals who breathe life into it absolves them of responsibility for their actions.¹⁸ They can throw their hands up in a helpless gesture, because, if they view law as an innate entity which somehow compelled the outcome of a case, a judge's opinion, or a statute, then they cannot be held responsible.

A judge is no mere agent of law, but a person who shapes the law. According to Noonan, participants in the legal system, including judges, should "become more aware of themselves and that their actions affect real people."¹⁹ This awareness will result in their becoming more responsible for their actions.²⁰

Judge Benjamin Cardozo, well-known judge on the New York Court of Appeals, was one judge who, in Noonan's view, was aware of himself in a way many other judges were not. Noonan quotes approvingly a passage from Cardozo's famous book, *The Nature of the Judicial Process*, in which Cardozo mused about the "subconscious forces" at work in judges, recalling William James' idea that all individuals have "an underlying philosophy of life . . . a stream of tendency . . . which gives coherence and direction to thought and action."²¹ "Judges," he wrote, "cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and

¹⁸ John T. Noonan, Jr., *Persons and Masks of the Law* (New York: Farrar, Strauss and Giroux, 1976), pp. 10-11.

¹⁹ *Ibid.*, p. xi.

²⁰ *Ibid.*

²¹ *Ibid.*, p. 140.

the resultant is an outlook of life . . . which, when reasons are nicely balanced, must determine where choice shall fall.”²²

Noonan applies Cardozo’s musings to the great judge himself, speculating what ‘subconscious forces’ that might have prompted Cardozo to write his famous opinion in *Palsgraf v. Long Island Railroad*, a case discussed in every tort class. One factor, he suggests, interestingly enough, is that Cardozo never married and was childless, the result of which might be that Cardozo would not view the chain of events in the same way as Mrs. Palsgraf who was both married and had children.²³ It seems to this writer that to propose the possibility that a faith tradition might shape a judicial opinion does not seem quite as speculative.

What then does all this have to do with Judge Noonan and immigration? Milner Ball has said that a believer is someone who has been “seized by the biblical stories.”²⁴ In other words, someone who has been seized by narrative. One of the central themes of the biblical stories is that of exile; the narratives of illegal aliens in immigration court also speak of exile. Consequently, the imagination of the person ‘seized’ by the biblical narrative of exile may really ‘hear’ the other’s narrative. Has Judge Noonan, who lives in the “thick narrative of Catholicism,”²⁵ been seized by the biblical stories? Does he ‘hear’ the other, in part, because the biblical narrative has ‘seized’ his imagination? Does, can biblical literature, refracted through church and judge, nudge the law? It may be that the play between religious faith and judges’ decisions is not so much based on principles and doctrines, be they legal or religious, but rather the play between narrative and narrative,

²² Ibid.

²³ Ibid., p. 143.

²⁴ Milner Ball,

²⁵ Hauerwas and Church, p. 857.

in which imagination is critical. Can this relationship to “this other and greater” shape one’s imagination such that we can identify with the other? Theologian Walter Brueggemann has defined imagination as “the capacity to entertain images of meaning and reality that are out beyond the evident givens of observable experience. That is, imagination is the hosting of ‘otherwise’”²⁶ I would suggest that it is also the hosting of “the other,” and for a judge embedded in Catholicism the biblical narrative is the foundation upon which the Church has built its teaching regarding immigrants, the other.

Central to the narrative in the Hebrew Scriptures is the theme of exile; no one seems to be permitted to remain in one place.²⁷ God exiles Adam and Eve from the Garden of Eden, and Cain’s murder of his brother, Abel, dooms him to the life a wanderer.²⁸ But the critical story of the Israelites’ wanderings begins with God’s command to the patriarch Abraham, “Go from your country and your kindred and your father’s house to the land that I will show you.” (Gen. 12:1 NSRV) Like many modern refugees, famine drives Abraham to seek food in a different country, in Egypt, where he then resided “as an alien,” eventually returning to Canaan. (Gen. 12:10; 13:1-4 NSRV)

Faced with yet another famine, Abraham’s son, Jacob, sends his sons to Egypt, where he eventually takes his entire family and for a time flourishes. (Gen 42:1-3; 46:1-4 NSRV) A change in government in Egypt, however, brings oppression and persecution to the Israelites (Ex. 1:8-11 NSRV), and, again, like modern day refugees, the Israelites

²⁶ Walter Brueggemann, William C. Placher and Brian K. Blount, *Struggling With Scripture* (Louisville: Westminster John Knox Press, 2002), pp.16-17.

²⁷ Terry Coonan, “There Are No Strangers Among Us: Catholic Social Teachings and U. S. Immigration Law,” *The Catholic Lawyer* 40 (2000), p. 107.

²⁸ Michael Scarperlanda, “Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution,” *Connecticut Law Review* 29 (1997), pp. 1620-21.

flee the oppression and wander in the wilderness for forty years. Economic hardship and political persecution force them to leave their homes to seek new ones.

Because the Israelites endured injustice as aliens in a foreign country, the narrative tells us, the Hebrew God enjoins his people to pay particular attention to the care and protection of the alien. The themes of exile and care for the alien come together in Leviticus 19:33-34 (NSRV): “When an alien resides with you in your land, you shall not oppress the alien. The alien who resides with you shall be to you as the citizen among you; you shall love the alien as yourself, for you were aliens in the land of Egypt: I am the Lord your God.” Intimate knowledge of the alien experience compels them to take care of the stranger in their midst: “You shall not oppress a resident alien; you know the heart of an alien, for you were aliens in the land of Egypt.” (Ex. 23:9 NSRV)²⁹ Except for the command to worship only Yahweh, this is the command repeated most frequently in the Hebrew Scriptures.³⁰

Exile and homelessness mark the life of Christ as well. To escape Herod’s threat to kill their new son, Mary and Joseph take Jesus and flee to Egypt where they live until Herod’s death.³¹ Later, when Jesus is an adult, someone says to him, rather too eagerly, that he would follow him anywhere he goes, but Jesus cautions him, “Foxes have holes, and birds of the air have nests; but the Son of Man has nowhere to lay his head.” (Mt. 8:20 NSRV)

²⁹ Ibid., p. 1621.

³⁰ William R. O’Neil and William C. Spohn, “Rights of Passage: The Ethics of Immigration and Refugee Policy,” *Theological Studies* 59 (1998), p. 84.

³¹ Coonan, p. 109.

Building upon these biblical narratives, papal encyclicals and the writings of American bishops form the core of Catholic social teaching regarding immigrants.³² A clear example is this statement made by Pope Pius XII in 1952, prompted by the refugee crisis at the end of World War II:

The émigré Holy Family of Nazareth, fleeing into Egypt, is the archetype of every refugee family. Jesus, Mary and Joseph, living in exile in Egypt to escape the fury of an evil king, are, for all times and places, the models and protectors of every migrant, alien and refugee of whatever kind who, whether compelled by fear of persecution or want, is forced to leave his native land, his beloved parents and relatives, his close friends and to seek a foreign soil.³³

If the Holy Family was the archetype of refugee families around the world, then what was to be the Church's response? Whereas the Hebrew God had commanded His people to care for aliens because they too had been aliens, the Church, found an additional reason for that same concern in the New Testament, namely that in strangers the Christian meets Christ,³⁴ an idea presented by Jesus himself in a parable about the last judgment. In that parable, the king invites into the kingdom those who had fed him when he was hungry, provided drink when he was thirsty, welcomed him when he was a stranger, gave him clothes when he had none, cared for him when he was sick, and visited him when he was in prison. (Mt. 25: 31-36)

³² Ibid., pp. 105-6.

³³ Pope Pius XII, Encyclical Letter *Exsul Familia*, quoted in Scarperlanda, p. 1621.

³⁴ Coonan, p. 111.

Puzzled, the invitees know they have never given the king food or drink or clothes and ask, “Lord, when was it that we saw you hungry and gave you food, thirsty and gave you something to drink? And when was it that we saw you a stranger and welcomed you . . .?” He replies, “[J]ust as you did it to one of the least of these who are members of my family, you did it to me.” (Mt. 25:37-40 NSRV) In the Christian tradition, one who welcomes the stranger, welcomes Christ. “This religious conviction,” writes law professor Terry Coonan, “particular as it is to the Christian tradition, is the foundation of Catholic teachings on immigration.”³⁵

The other New Testament narrative central to the Church’s teaching on immigration is the parable of the Good Samaritan. A lawyer asks Jesus, “Who is my neighbor?” Jesus responds by telling a story of a Jewish traveler beaten and left on the side of the road who is ignored by those who should have helped him. The one who does drop to his knees and cares for him is a Samaritan, although Jews had no dealings with Samaritans. (Lk. 10: 25-37) Cultural and religious differences were no excuse for ignoring suffering. Pope John Paul connects this biblical narrative to the issue of immigration: “For her part, the Church, like the Good Samaritan, feels it her duty to be close to the illegal immigrant and refugee, contemporary icon of the despoiled traveler, beaten and abandoned on the side of the road to Jericho.”³⁶

Papal encyclicals and letters and the writings of bishops have built upon the biblical narratives, moving from stating general principles to advocating particular policy changes, and, in so doing, have directly challenged immigration policy, and, in particular, U. S. immigration law. Among the most important, general principles enunciated by the

³⁵ Ibid.

³⁶ Pope John Paul II, “Faith Works Through Charity,” message delivered on World Migration Day, August 21, 1996.

Church is the right of families and individuals to migrate when faced with economic hardship. This right, implied in the encyclical that is considered the beginning of Catholic social teaching, *Rerum Novarum*, issued in 1891 by Pope Leo XIII, was made explicit in the Second Vatican encyclical, *Pacem in Terris*, issued by Pope John XXIII in 1963.³⁷

While affirming this right of migration, the Church has also recognized the sovereignty of nations to control their borders. In 1969, for example, the Church emphasized that the right of migration had to be balanced with the welfare of the receiving country.³⁸

The well-being of migrants and refugees has been a deep concern to John Paul II, a concern reflected in his papal letter of 1992, “Refugees: A Challenge for Solidarity,” which pushed the Church even further in its positions. Building upon Pope Paul VI’s assertion that the refugee, though having lost citizenship, belongs to the human family and is a citizen of the world community, John Paul addressed asylum policy directly, stating that asylum was a right if a refugee would be killed if sent back to her home country.³⁹ Foremost was a person’s need to live in community, not the interests of the state, even the interest of national security.⁴⁰ Pushing even further, John Paul declared that a refugee should not be sent back if his life was threatened even if he were not a true refugee,⁴¹ a position that Professor Coonan has pointed out challenges both domestic and international law.⁴²

³⁷ Noonan, pp. 116, 118.

³⁸ Ibid., pp. 123-24.

³⁹ Ibid., p. 131.

⁴⁰ Ibid.

⁴¹ Ibid., p. 133

⁴² Ibid., p. 134.

The Catholic bishops have been even more specific in their recommendations for changes in U.S. immigration policy and law, advocating, among other things, that there be a statute of limitations on deportation and supporting amnesty programs for illegal aliens.⁴³ They have also urged changes be made to the 1996 law which many think treats illegal aliens very harshly.⁴⁴

The specificity of the Bishops' recommendations has raised a question about their moral authority in the Church, and has prompted a discussion about whether the Church speaks with more authority when it enunciates broad themes in public policy debates, rather than when it offers specific legal proposals.⁴⁵ Professor Coonan notes that there does seem to be some consensus that "the greater the degree of particularity in a church social teaching, the less morally obligatory the teaching."⁴⁶

The biblical narrative has provided the Church with moral metaphors through which the faithful can imaginatively enter into the experience of the other. If the person of faith sees in the stranger the face of Christ, in the alien a member of the world community rather than a stranger, and if a Catholic thinks of herself as a pilgrim in this life, there is the hope of paying attention to the narrative of the other in a way that might not have otherwise been possible. As noted earlier, Brueggemann has described imagination as "the hosting of 'otherwise'" Immigration cases are thick with narratives which may or may not be heard—the hearing may depend on the religious imagination.

⁴³ Ibid., p. 137.

⁴⁴ Ibid., p. 156.

⁴⁵ Ibid., p. 160.

⁴⁶ Ibid., pp. 159-60.

That Noonan, embedded as he is in the Catholic nomos, might possess such an imagination is not left to speculation alone. In two different settings he signals that his view of the law resonates with his religious tradition. In *Persons and Masks of the Law* he describes law's power to mask an individual to the point that his/her personhood becomes invisible. He writes, "By mask I mean a legal construct suppressing the humanity of a participant in the process. Mask is the metaphor I have chosen for such constructs, because the human face is where emotion and affection are visible if not deliberately concealed."⁴⁷ The law has 'masked' people, for example, by classifying them as property and by naming them "defendant" and "plaintiff."⁴⁸

He also thinks that justice conceived as treating like cases alike in only one virtue required of the judge. He writes, "Justice to persons, Augustine reminds us, may be identical with love—an active service to another, who is loved."⁴⁹

Undergirding the biblical narratives and Catholic social teaching regarding immigrants is the dignity and value of each human being. As will be shown, in his immigration opinions, Noonan's concern for the "humanity of a participant in the process" is unmistakable.

In a speech at the University of Dayton Law School, a Catholic university, Judge Noonan connected his religious convictions to his approach to law, telling students that "the theme of kindness should be at the heart of the Catholic law school."⁵⁰ "Kindness," he added, "must animate all true service to the law."⁵¹ To illustrate his point, Judge Noonan told the story of a Cuban illegal alien who, because of his criminal background,

⁴⁷ Noonan, *Persons and Masks of the Law*, p. 20.

⁴⁸ *Ibid.*, p. x.

⁴⁹ *Ibid.*, p. 18

⁵⁰ John T. Noonan, Jr., "The Heart of the Catholic Law School," *Dayton Law Review* 23 (1997), p. 9.

⁵¹ *Ibid.*

had been permitted by Castro to escape to the United States. Once here, he continued to commit crimes, was convicted and served three years in state prison. While in state prison, the Immigration and Naturalization Service (INS) took control of him, and he ended up in federal prison for eight years, never having had a trial or been convicted, simply awaiting deportation because Cuba would not accept him. The opinion of a panel of three judges, authored by Noonan, affirmed a district court's decision to free him on a writ of habeas corpus; however, later, sitting en banc, the Ninth Circuit reversed the panel's decision.⁵²

As he had done in his opinion for the court, Noonan criticized the INS for its lack of imagination in devising some way to return the alien to Cuba. He observed, "By a writ as powerful and as magical as lettres de cachet by which the king of France used to imprison disfavored subjects, an anonymous official of the Immigration Service was able to effectively incarcerate a man without trial in a free country, a country where due process of law is the fundamental guarantee of justice."⁵³

But in this forum, Noonan could go beyond the constraints of a judicial opinion, and he did, asserting that the case illustrated how the bureaucratic mind "concentrates on getting the job done efficiently, quietly, without discomfort and without *imagination* [emphasis added] and without the empathy that *kindness* [emphasis added] requires."⁵⁴ The illegal alien was "among the miserable of the earth, the kind of people that only the kindness of Mother Teresa could embrace."⁵⁵

⁵² Ibid., pp. 11-12.

⁵³ Ibid., p. 12.

⁵⁴ Ibid., p. 11.

⁵⁵ Ibid., p.14.

Unmasking the person whom the law has made invisible, justice as active service to another who is loved, imagination, kindness—all are animating principles for Noonan, and they are also principles which, while accessible to all, resonate with the biblical narratives regarding hospitality to the alien and care for the stranger. That these principles shape his immigration opinions is clear.

Most of Judge Noonan's opinions in immigration have concerned political asylum. To win political asylum under U. S. immigration law the petitioner must prove that she has a well-founded fear of persecution should she be deported to her home country based upon political opinion, religious belief, nationality, race or membership in particular social group. Typically, a finding is that the petitioner has not proven the necessary requirements. This despite the petitioner's stories of beatings, torture, and other traumatizing events; it is this narrative and the credibility of the narrator upon which so much turns. But often those making the initial determination, an asylum officer or immigration judge, discount that credibility because they cannot "transcend the barriers created by the inherent otherness of trauma, culture and language."⁵⁶ I suggest that cultural chasm between alien and judge might be bridged by imagination, an imagination "seized" by those biblical narratives upon which Catholic social teaching regarding immigrants is based. In other words, narrative speaks to narrative.

The political asylum opinion by Noonan which has received the most attention is *Lazo-Majano v. INS*, 813 F. 2d 1432 (1987), a case involving a Salvadoran woman who, working as a housekeeper, had been brutally beaten and abused by a sergeant in the Salvadoran army. Her husband had fled the country fearing both the government and

⁵⁶ Ilene Durst, "Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative," *Rutgers Law Review* 53 (2000), p. 127.

guerrillas. The sergeant threatened that if her husband he would kill both her and her husband for being subversives.⁵⁷ The question before the court was whether the Board of Immigration Appeals (BIA) was correct in sustaining a decision by an immigration judge denying her political asylum because the persecution she had suffered was solely personal and not based on a political opinion she held.⁵⁸

Judge Noonan described in dramatic detail the violent abuse she suffered, concluding persecution “[was] stamped on every page of this record,” rather simple “mistreatment” as the BIA had described the abuse.⁵⁹ She was “singled out to be bullied, beaten, injured, raped and enslaved.”⁶⁰ In detailing her abuse, Noonan contextualized it; it was not a mere idea, but a terribly traumatizing event for her. One might say that Noonan was ‘seized’ by her narrative.

That she was persecuted and not merely mistreated was evident to Noonan. The question then was whether she was persecuted because of her political opinion. Political opinion, he pointed out, must mean “the political opinion of the victim as seen by the persecutor.”⁶¹ In an interesting move, Noonan attributed to the sergeant the political opinion that “a man has a right to dominate” a woman, and that “he [had] persecuted Olympia [the petitioner] to force her to accept this opinion without rebellion.”⁶² She could not have had a different opinion than his because she would have then experienced more abuse. By escaping, however, Olympia had asserted a different opinion, a “political opinion” for which she could have been persecuted.⁶³ It should be noted that Noonan

⁵⁷ *Lazo-Majano v. INS*, 813 F. 2d at 1433.

⁵⁸ *Ibid.* at 1434.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.* at 1435.

⁶² *Ibid.*

⁶³ *Ibid.*

used the petitioner's own name, Olympia, unmasking her and underscoring the inhumanity she had suffered.

To those who still might not be convinced that her escape reflected a political opinion Noonan pointed out that Olympia's abuser had attributed to her subversive political opinions even though she had not participated in any political activity. Her political opinion, as Noonan characterized it was that the military was responsible "for lawlessness, rape, torture, and murder,"⁶⁴ and, for having this opinion, she has been tortured by the sergeant. But even if she had never once reflected on the government, "the cynical imputation of political opinion to her [was] what counts under both statutes."⁶⁵

The dissent called Noonan's holding "a construct of pure fiction" and that it had "outdone Lewis Carroll" in suggesting that "male domination in a personal relationship" amounted to political persecution.⁶⁶ The petitioner had had no political opinion for which she had been persecuted, despite Noonan's claims.⁶⁷

A 1996 dissent also reflects Noonan's care to consider the other, to 'hear' her narrative despite the barriers of culture and language. The Ninth Circuit heard the case of an Iranian woman who had applied for political asylum on the basis that if she were deported to Iran she would be persecuted because of her political opinion, an application which had been denied.⁶⁸ To prove her claim, she had described three incidents, two of which involved the enforcement of Muslim law regarding women.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid. at 1436.

⁶⁷ Ibid. at 1439.

⁶⁸ *Fisher v. INS*, 79 F. 3d 955 (1996).

In the first incident, after attending a social gathering of men and women where the male host had worn his swimsuit, she had been arrested and handcuffed and held for four hours, a “traumatic” experience. At another time, walking along a street, she was “seized” by government agents, put into a car at gunpoint and lectured about having some hair showing outside of her chador. Lastly, government agents came to her home and searched it for government enemies.⁶⁹

The majority affirmed the denial of political asylum on the basis that being detained for not wearing the veil was not persecution on account of religious or political beliefs. In addition, she was found to lack good moral character because she had had a sham marriage to an American citizen, hence she was ineligible even for withholding of deportation, another legal basis to avoid deportation.⁷⁰

In the opening of his dissent, Noonan ‘unmasked’ the petitioner, writing that he would refer to the petitioner by “the name she calls herself”, Saidah Hassib-Tehrani.⁷¹ He noted how ironic it was that the majority insisted on calling her by her married name although the court had declared her marriage a sham.⁷²

He then chastised the majority for not following new guidelines stating that “a woman could have imputed to her a political opinion about laws based on gender— political opinion which would be the basis of persecution by those enforcing the regime’s view.”⁷³ These guidelines, ignored by the majority, invited the court to develop asylum law “with special attention to the problems of women oppressed on account of their

⁶⁹ Ibid. at 969-70.

⁷⁰ Ibid. at 955.

⁷¹ Ibid. at 967.

⁷² Ibid.

⁷³ Ibid.

nonconformity with the moral codes of a rigorist regime.”⁷⁴ In other words, the guidelines invited the court to ‘hear’ women’s narratives in a different way; the majority had not heard Saideh’s narrative as it should have been heard.

Noonan was incredulous that the majority thought that requiring a woman to dress a certain way would not be evidence of persecution due to membership in a social group. “We are not very far from *The Handmaid’s Tale* when seven judges of this court are capable of expressing such a view.”⁷⁵

Noonan then examined whether she had a “credible, direct and specific basis” for her fear as required by the law. Although the incidents she reported would not by themselves constitute persecution, when viewed from the perspective of the persecutors they do constitute persecution because “the regime perceived her as a religious nonconformist.”⁷⁶ And because Iran was a theocracy, religious beliefs counted as political opinions.

What is most telling about Noonan’s attention to cultural and gender barriers is the question he thinks the court should have asked itself: “If we had the beliefs and the experience and the gender of Saideh Hassib-Tehrani, would we reasonably fear that we had a one-in-ten chance of suffering seriously on account of our beliefs if we returned to Iran?” “The answer,” he wrote, “is obvious.”⁷⁷ In asking this question, in challenging the court to imaginatively enter the experience of an Iranian and Muslim woman, Noonan in a sense practiced hospitality to the stranger, a metaphor central to the biblical narrative and to Catholic social teaching.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid. at 970.

⁷⁷ Ibid. at 971.

Hearing the stranger's narrative as he would hear it seems central to Noonan's analysis. In a 1990 decision, he wrote the opinion holding that a veteran of the Salvadoran army, who fled the country fearing that guerrillas might kill him as they had other veterans, did in fact have a reasonable basis for believing that he would be persecuted if he were returned.⁷⁸ The BIA had agreed that his fear, given his circumstances, was reasonable, but that the danger from the guerrillas did not amount to persecution, but rather was "a threat with a strategic purpose" given the state of civil war.⁷⁹

Noonan disagreed with the BIA's analysis; rather than looking at an act from the persecutor's point of view was wrong, the court had to ground its analysis of reasonableness of the petitioner's fear in "the political, social and cultural milieu of the place where the petitioner lived."⁸⁰ "Reasonableness," Noonan asserted, "refers to the reasonable apprehension and reactions of a particular applicant with a particular set of political, social and cultural determinants."⁸¹ In other words, hear the petitioner's story as he would hear it. It did not matter whether guerillas might see the murder of an army veteran as an act "with a strategic purpose"; the murder would clearly be "an act of barbarism, of terrorism, of persecution."⁸²

Besides being concerned that the alien's story be contextualized and imaginatively entered into by the hearer, Noonan insists that the alien receive all that he is due under the law and be treated respectfully, another expression of practicing hospitality to the stranger. This concern is evident in his opinion in *Escobar-Grijalva v.*

⁷⁸ *Montecino v. INS*, 915 F. 2d 518 (1990).

⁷⁹ *Ibid.* at 519-20.

⁸⁰ *Ibid.* at 520.

⁸¹ *Ibid.* at 520-21.

⁸² *Ibid.* at 520.

INS, 206 F.3d 1331 (2000), holding that a Guatemalan woman had been deprived of the assistance of counsel due her under the law. At her deportation hearing she met her attorney for the first time, and she was doubtful that he was even her attorney.⁸³ All parties were confused, including the INS attorney who verbally expressed his doubt to the immigration judge that the attorney present could effectively represent her.⁸⁴ The judge then presented her with three alternatives: she could choose the attorney who had shown up and proceed, she could proceed on her own without the aid of an attorney or the judge would grant a continuance so she could select an attorney with the proviso that the attorney she selected had not previously represented her.⁸⁵ After she chose the attorney who was present, the hearing proceeded with the result that her asylum application was denied. The woman appealed, claiming she had not received effective assistance of counsel. The BIA affirmed, stating that she had not satisfied the requirements for proving ineffective assistance of counsel.⁸⁶

Noonan did not agree. Not only was it a “mockery” to say that Escobar was the attorney’s client, but a mere “It’s okay” from Escobar did not indicate with any clarity what option she really wanted.⁸⁷ In a rare compliment to the INS, Noonan noted that the INS attorney “had the decency to object” when confusion reigned.⁸⁸ Though the immigration judge himself was irritated by the confusion, his irritation was no excuse for limiting whom she could select to represent her: “Deprivation of the statutory right to

⁸³ *Escobar-Grijalva v. INS*, 206 F. 3d 1331, 1332-33 (2000).

⁸⁴ *Ibid.* at 1333.

⁸⁵ *Ibid.* at 1334.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* at 1335.

⁸⁸ *Ibid.*

counsel deprives an alien asylum-seeker of the one hope she has to thread a labyrinth almost as impenetrable as the Internal Revenue Code.”⁸⁹

Noonan’s frustration was not limited to the immigration judge but included the immigration bar, noting the “attorneys [were] shuffling cases and clients.”⁹⁰ In a statement which reflected his own admonition to law students regarding kindness, Noonan stated, “There is a need to clean house, to get rid of those who prey on the ignorant. The starting point is not to make the helpless the victims.”⁹¹

In another opinion, Noonan underscored the importance of counsel for aliens appealing adverse decisions, stating that the petitioner in that case had “lacked what Alexander Solzhenitsyn has said to be indispensable and missing in totalitarian countries—‘a clear-minded ally who knows the law.’”⁹² “No one,” Noonan wrote, “was there to help him tell his story.”⁹³ Without an attorney, the petitioner’s narrative of his persecution, refracted by the immigration judge, had become a “flat, colorless, caricature.”⁹⁴ The court remanded the case for reconsideration.

In *Price v. INS*, 941 F. 2d 878 (1991), another case involving rights of aliens, the Ninth Circuit reviewed the decision to reject an Englishman’s citizenship application because he refused to answer a question regarding his membership in organizations on the grounds that the question violated his right of association under the First

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² *Castro-Ryan v. INS*, 847 F. 2d 1307, 1313 (1988).

⁹³ Ibid. at 1314.

⁹⁴ Ibid. at 1313.

Amendment.⁹⁵ The majority upheld the decision, asserting that Congress had had a reasonable basis for requiring the question in the first place.⁹⁶

In dissent, Noonan agreed with the applicant that question “chill[ed] the right of association,” pointing out that the petitioner had lived in the United States for thirty years, and his reactions resembled those of a citizen and “[r]ightly so. He had imbibed the air of freedom.”⁹⁷ While congressional power to set naturalization standards was great, it was not unlimited; a narrowly tailored question would serve the congressional intent just as well without violating a constitutional right.⁹⁸ Noonan noted that aliens continued to be treated as “second class people” in the United States.⁹⁹

In addition to attention to the rights of aliens, Noonan also pays careful scrutiny to the treatment aliens receive from the INS and other agencies, another reflection of kindness and care for the stranger. For Noonan, immigration law is a ‘labyrinth’ in which an applicant or petitioner must have the help of counsel to find his or her way. That tortuous route can be made even more so by the INS and the BIA in his view. In a case already discussed, *Montecino v. INS*, 915 F. 2d 518 (1990), Noonan took both the INS and the BIA to task. “The whole record,” he wrote, “is one of a shoddy process.”¹⁰⁰ Even the State Department did not escape his examination, Noonan describing a letter the department had sent to as “a kind of perfunctory letter that might be used by a department store dismissing a customer’s mistaken complaint of an overcharge.”¹⁰¹

⁹⁵ *Price v. INS*, 941 F. 2d 878 (1991).

⁹⁶ *Ibid.* at 882.

⁹⁷ *Ibid.* at 885.

⁹⁸ *Ibid.* at 886.

⁹⁹ *Ibid.* at 885.

¹⁰⁰ *Montecino v. INS*, 915 F.2d 518, 520 (1990).

¹⁰¹ *Ibid.*

In *Castrejon-Garcia v. INS*, 49 F.3d 603 (1995), Noonan compared the INS to Inspector Javert, the police officer in Victor Hugo's *Les Miserables* who relentlessly pursues Jean Valjean over the years simply because he had stolen a loaf of bread; in this case, however, the pursuer was the INS and the pursued was a Mexican who had entered illegally in 1970 and resided in the U. S. since entering.¹⁰² In order to enter the country legally and apply for an adjustment of his status, he returned to Mexico to obtain a visa from the U. S. consulate. Before to his appointment at the consulate, his wife gave birth back in the United States and he returned without a visa.¹⁰³

Noonan observed that he had then been “tried with remarkable speed” for entering illegally, was convicted and deportation proceedings instituted, this despite having been in the country for eighteen years, and despite being a licensed general contractor and supporting a family.¹⁰⁴ He applied for suspension of deportation and it was granted. But five years later, the Board of Immigration Appeals reversed and remanded to case to the immigration judge to determine voluntary departure which was granted in 1994.¹⁰⁵

Noonan expressed his amazement that the INS and the BIA would fault someone for wanting to regularize their residence; however, more importantly, he questioned the BIA's view that the alien's eight-day visit to Mexico was not a casual visit and therefore a violation of the statutory requirement that one live in the U. S. for seven continuous years before applying for adjustment of status.¹⁰⁶ In Noonan's view, the statute's intent was to ensure that an alien was committed to living in the U. S.—an eight-day trip, especially one taken to regularize his status, did not constitute a rejection of that

¹⁰² *Castrejon-Garcia v. INS*, 49 F.3d 603, 605 (1995).

¹⁰³ *Ibid.* at 604.

¹⁰⁴ *Ibid.* at 604-605.

¹⁰⁵ *Ibid.* at 604.

¹⁰⁶ *Ibid.* at 604-605.

commitment.¹⁰⁷ That commitment was further reflected in the fact that the petitioner owned his own business and that his family was in the U.S. The case was remanded.¹⁰⁸

A final example of Judge Noonan's kindness and his desire to unmask the humanity of the individual caught up in the legal system is his dissent in *Kazlauskas v. INS*, 46 F 3d 902 (1995), in which the Ninth Circuit upheld a decision to deny a Lithuanian man political asylum and withholding of deportation. Unlike the majority, Noonan thought that there was clear proof that Kazlauskas had suffered persecution by officials of the former Soviet Union which made him eligible for asylum.

It is in the details about Kazlauskas's life, however, that Noonan unmasks his individual humanity, details which, in Noonan's view, the immigration judge should have considered in his decision. Indeed, taken together these details compose the story of Kazlauskas's life in the United States—whereas Noonan had been concerned that an alien have an attorney to help tell her story, here Noonan became the storyteller.

Not only had Kazlauskas been rehabilitated from his teen-age alcohol problem, “a rehabilitation noted somewhat disparagingly by the IJ [immigration judge],” but also he had worked full-time for two years and was planning to get married. Through his job he supported his mother, had registered for the Selective Service and had paid income taxes since 1982. Noonan also noted that for 18 months “he had volunteered for about eight hours each Sunday at a recovery house to help ‘young people stay away from alcohol.’”¹⁰⁹

But it is the way in which Noonan consistently referred to Kazlauskas's alcoholism as a disease that one especially senses kindness and care for the stranger.

¹⁰⁷ Ibid. at 605.

¹⁰⁸ Ibid.

¹⁰⁹ *Kazlauskas v. INS*, 46 F.3d 902, 907-908 (1995).

Noonan chastised the immigration judge for not observing that Kaslauskas' failure to appear with his mother when she was granted political asylum was due to "his suffering from the age of alcoholism at the age of 16 . . ." and for failing to connect Kaslauskas's burglary convictions at the age of 19 to the "illness which he then suffered." Noonan added, "We have long recognized that chronic addiction to alcohol is an illness not a crime." Finally, in his view, the immigration judge should have considered the fact that Kaslauska's deportation would create hardship for his mother "who is now lawfully admitted to the United States and who depends heavily upon him for financial support, companionship and family affection."¹¹⁰ Revealing his frustration at the majority's decision, Noonan concluded, "The Board, affirming the [immigration judge] without any effort to redo his inadequate work, achieved a severe result. We should, and could, do better."¹¹¹

Noonan's admonition to the immigration judge that he should have considered the hardship Kaslauskas's deportation would inflict on his mother was followed by a citation to a previous decision by the Ninth Circuit. In doing so he followed legal conventions and rightly so. There was no reference to biblical narrative, to Catholic social teaching, no mention that judges should be kind, that law should not mask the humanity of those who stand before it. And yet, one is reminded of Cardozo's musings about the 'subconscious forces' that shape judicial decisions, and Noonan's own musing about the subconscious forces that might have shaped Cardozo. Embedded as he is in his Catholic faith, it does not seem to be completely out of bounds to suggest that among the factors tugging at Noonan are the biblical narratives and the gloss put on them by papal

¹¹⁰ Ibid.

¹¹¹ Ibid. at 908.

encyclicals and bishops' statements. The majority had access to the same precedent he cited, but did not 'see' in that precedent, nor in the narrative of Kazlauskas's life, what he saw. His opinions resonate with the biblical narratives, narratives which encourage the religious imagination to think about 'the other'.

In his book, *The Word and the Law*, Milner Ball mourns the fact that law often brings death rather than life. Law, in its various manifestations, such as statutes, decisions, and briefs, is closed, not open-ended; it crushes, and does not lift, the spirit. "Death," he writes, "is integral to American law."¹¹²

Echoing Noonan's discussion of how the objectifying of law has masked the humanity of individuals, providing judges with an out, Ball claims that this morbidity is reflected in judges who see themselves as the "channels of impersonal standards of society," claiming that principles, not life, compel their decisions.¹¹³ In professing judicial restraint, judges surrender responsibility, a form of dying, in Ball's view.¹¹⁴

Life, he asserts, is to be found in the movement "to nudge law toward art,"¹¹⁵ specifically the law and literature movement which provides an open-endedness because stories can breathe life into law. This open-endedness leads to ears that can hear otherness, can hear those who are at the bottom. And when those at the bottom are heard and seen, the Word has broken through.

The Word, Ball is quick to point out, is not to be confused with religion. In the view of theologian Karl Barth, the Word is God making himself known; religion is only human beings striving after God. In religion, we talk; when the Word breaks through,

¹¹² Milner S. Ball, *The Word and the Law* (Chicago: University of Chicago Press, 1993), p. 136.

¹¹³ *Ibid.*, p. 137.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, p. 144.

we listen. Ball describes this distinction as the nonreligious Word. “Religion is finally centered on the self. The Word directs to the other.”¹¹⁶ The Word is concerned with people; those constituted by it are as well. Ball then describes seven practices of law—ranging from poverty lawyer to housing court judge to tribal attorney—in which he sees the Word breaking in because the other is heard.

Ball is not enthusiastic about religion qua religion; in a post-9/11 world, he may be even less. He does suggest that religion can be ‘adopted’ by the Word: “Religion adopted by the Word is not about religion or the self but about the world and humans, about what Paul Lehmann calls the struggle ‘to make and to keep human life human in the world.’ Those who are addressed are addressed as humans and so are constituted human.”¹¹⁷

If the Word adopts religion, if one’s life in religion is a “new life ‘in existence for others’” as Dietrich Bonhoeffer suggests, is it not possible that religion adopted by the Word, like art, could become another cultural source of life for the law?

I would suggest that Judge Noonan’s immigration opinions reflect the real possibility that his moral obligation to his faith breathes life into the law. To borrow Ball’s language, the Word which directs us to the other, appears to have broken through because the other has been heard. Biblical narrative has spoken to the alien’s narrative, and, has allowed for the imaginative entry into that narrative.

In the end, I return to Judge Noonan’s dissent in *Fisher v. INS* in which he wrote, “It is always appropriate to refer to people by the names they give themselves.

Consequently, in this dissent Saideh Hassib-Tehrani will be identified by the name she

¹¹⁶ Ibid., p. 98.

¹¹⁷ Ibid., p. 86.

calls herself.” At that moment ‘the other’ was heard, not just listened to, a life-affirming act compelled, not by any legal principle, but perhaps by the breaking in of the Word.

The mask was taken off and the human being was seen.