

interpreted as a challenge to Rome. We may be grateful that the German bishops in their response to the CDF indicate that they do not think the matter is closed. This is important for matters beyond the pastoral care of the divorced and remarried. For several years now the atmosphere within the Church has been unreceptive to free inquiry and free expression, so that pastors and scholars are reluctant to risk exploring what is behind pastoral intuitions. The letter of the German hierarchs may provide an opportunity to overcome such reluctance.

Ladislas Orsy believes that the initial German text was "a model of what today a pastoral letter ought to be" and was an initiative by the bishops which took seriously the "power conferred on them directly through their sacramental ordination." The bishops "balanced their unflinching communion with the universal church with the quiet assertion of their own authority."⁸¹ Addressing the present imbalance between the universal and local Church is an important ecclesiological concern. In Peter Hünemann's view, the bishops of the Upper Rhine were demonstrating "how bishops should function." They had taken up a pressing pastoral concern for the Church in Germany and had answered the frustration of many German Catholics who wondered if, in the present situation, "the bishops [are] any more than Vatican officials."⁸² By exercising their rightful role as pastoral leaders in their local churches, the three Germans have signalled that they see themselves as more than Roman legates to the local church. Although the first stage of the conversation has ended with the Vatican reasserting a rigorist position on eucharistic participation, there remains reason for hope. As an editorial in the London *Tablet* suggested, both for the sake of the specific issue of the treatment of the divorced and remarried but also for the sake of the larger ecclesial issue of the authentic role of the local bishops, "what counts is that the matter has been raised at the episcopal level, responsibly and pastorally."⁸³

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THE RETURN OF CASUISTRY

Simon, a 29-year old man who has recently tested positive for HIV, applies to enter a major religious order known for its apostolic work. Aside from the applicant's HIV status, his health and psychological status are fine, his reasons for entering the religious order are fundamentally ministerial, and his prayer life over the past few years has consistently evidenced a vocation to the priesthood in this particular

⁸¹ Orsy, "A German Initiative" 787.

⁸² Hünemann, "A Church in Dialogue" 898.

⁸³ "Dialogue on Divorce," *Tablet* 248 (1994) 1335-36, at 1335.

religious order. The admissions committee for the religious order is faced with one major issue, whether to reject the man solely on the grounds of his HIV status.

Casistry is back, in part because at the end of the 20th century we, like the admissions committee, face an extraordinary number of new moral issues and have few principles that resolve them. To demonstrate the importance of the return of casistry, I will review the recent literature, while doing some casistry with the case at hand.

New Issues

Should the admissions committee reject a candidate if he is HIV positive? How would an admissions committee know? Should they know?¹ New questions about a new disease raise new issues. Certainly the newness of the infection has brought with it as many ethical issues as it has raised medical and social ones.² In many ways, the newness caught many off guard,³ like those religious superiors and bishops who implemented policies of screening candidates ten years ago while responding to the pressures of insurance companies. Basically they invoked the insight of the 1983 Code of Canon Law (cc. 1029, 1051) that requires candidates to be physically suitable for future apostolic work. Now, however, other questions are being raised, especially whether these candidates might actually be suitable for future work and whether there are other ethical issues related to systematic screening.⁴ This

¹ This essay does not address the important questions of whether and how much emotional and financial support a religious order ought to provide to candidates from whom it requires HIV testing for admissions. See Jon Fuller, "HIV-Considerations for Religious Orders and Dioceses," in *Clergy and Religious and the AIDS Epidemic*, ed. Jon Fuller (Chicago: National Federation of Priests' Councils, 1994) 57–76; Jay O'Connor, "HIV Testing of Applicants," *ibid.* 77–82.

² Eileen Flynn, *AIDS: A Catholic Call for Compassion* (Kansas City, Mo.: Sheed and Ward, 1985); Richard McCormick, "AIDS: The Shape of the Ethical Challenge," *The Critical Calling* (Washington: Georgetown University, 1989) 315–28; Enda McDonagh, "Theology in a Time of AIDS," *Irish Theological Quarterly* 60 (1994) 81–99; Richard Smith, *AIDS, Gays and the American Catholic Church* (Cleveland: Pilgrim, 1994); William Spohn, "The Moral Dimension of AIDS," *Theological Studies* 49 (1988) 88–109; Daniel Sulmasy, "By Whose Authority? Emerging Issues in Medical Ethics," *TS* 50 (1989) 95–119, esp. 105–12. See also the special issue, "AIDS and Faith," *Eglise et Théologie* 23/3 (1992).

³ See Randy Shilts, *And the Band Played On* (New York: St. Martin's, 1987).

⁴ See Jon Fuller, "HIV/AIDS: An Overview," in *Clergy and Religious and the AIDS Epidemic* 1–43; James Schexnayder, "HIV/AIDS Policy Department," *ibid.* 83–86; The Diocese of Oakland HIV Policy Committee, "Policy Statement," *ibid.* 87–93. Also R. R. Calvo, "Admission to the Seminary and HIV Testing," in *Roman Replies and CLSA Advisory Opinions 1991* (Washington: Canon Law Society of America, 1991) 72–75; R. Gibbons, "Admission to the Seminary and HIV Testing," *ibid.* 76–77; Jack Anderson, "How Healthy is Healthy Enough? Canon Law Considerations in Matters of Health and HIV-AIDS Testing Policies," *Horizons* 20 (1993) 8–18; James Keenan, "Testing Candidates Applying to Seminaries and Religious Orders for HIV," *Review for Religious* (forthcoming, 1996). It should be noted that testing of physical suitability is different

latter issue is significant because, unlike other medical exams, HIV testing concerns not a present health crisis, but a possible, future health crisis that may appear ten or even fifteen years later. This type of testing is, then, the forerunner of another broader form of testing, genetic screening, which is urgently in need of ethical investigation.⁵ Thus the case presents us with the occasion not only to examine Simon and HIV testing, but also to anticipate other policies regarding testing by which we will know more about an individual's physical and psychological future than ever before. If we test for HIV today, what will we test for tomorrow? A good case like this one helps us see not only the new issues immediately relevant, but also the parallel emerging ones.

Casuistry emerges as a method of moral reasoning whenever extraordinarily new issues materialize. This occurred especially in the 16th century when high casuistry was developed and practiced. In a very important work, Albert Jonsen and Stephen Toulmin have described the new issues in the public and private arenas of life that prompted the birth of high casuistry.⁶ In the public world, Europeans through the explorations in the New World and trade with the East could no longer accept the older moral guidelines of the past. For instance, Pope Gregory IX's decretal *Naviganti vel eunti ad nundinas* (1237) was understood for centuries as forbidding maritime insurance, but by the beginning of the 16th century a prohibition against underwriting expeditions to the West and the East was unthinkable. Thus merchants petitioned faculty members of the University of Paris, such as John Mair, to render new decisions on the decretal. They responded by asking whether the case of an insurer guaranteeing the arrival of the worth of a cargo was any different than the case of the ship captain who secures the arrival of the cargo. Thus the question became a case and was placed against another case that described already validated moral activity. By showing congruency between the two, these writers provided new ways of circumscribing the decretal, distinguishing insurance from usury, and proposing ethical grounds to legitimate the insurance.⁷ Casuistry was used to liberate institutions from normative

from psychological testing. The latter screens out those candidates whose psychological makeup potentially either leaves them too vulnerable to the rigors of religious life or endangers the welfare of those whom the community serves. Physical examinations are not concerned with the potential threat a candidate could pose to himself or others.

⁵ Kathy Hudson et al., "Genetic Discrimination and Health Insurance: An Urgent Need for Reform," *Science* 270 (1995) 391–93.

⁶ Albert Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California, 1988).

⁷ An analysis of this case appears in Louis Vereecke, "L'assurance maritime chez les théologiens des XVe et XVIe siècles," *Studia Moralia* 8 (1970) 347–85; see a discussion of Mair's casuistry in James Keenan, "The Casuistry of John Mair, Nominalist Professor of Paris," in *The Context of Casuistry*, ed. James Keenan and Thomas Shannon (Washington: Georgetown University, 1995) 85–102.

determinations that did not keep pace with other developments.⁸ But with this freedom came the need for new expressions of moral guidance, and thus casuistry also provided those bankers, merchants, missionaries, explorers, and princes bent on expansionism with a new inductive method of moral logic for navigating the unfamiliar waters before them.

But not all new moral dilemmas in the 16th century were occasioned by expeditions. Religious and political conflicts in England at the end of the century raised questions that were unthinkable in earlier times: Could a priest lie about his identity? Could one take an oath and not keep it? Could a Catholic landowner contribute to a "heretic" church? There were few principles that addressed these questions, and those that did were ill designed to provide answers. Much like Mair and his successors, English writers sought to reexamine previous teaching by invoking not principles but cases, and to make distinctions that were not current in earlier years. A prime example was whether there was a distinction between lying and pretense. The case that enabled them to entertain this distinction was the pretense of the risen Christ who acted as though he meant to go on rather than to stay with the disciples at Emmaus.⁹

Casuistry was used also in the private forum, particularly for confession. Until the 16th century, confessors understood themselves both as physicians who recognized the infection of sin and as judges who determined the fitting penalty for the offense of sin. For these tasks, they turned to the confessional manuals, especially the *Summa Angelica* (1486) by the Franciscan Angelus de Clavasio and the *Summa*

⁸ Precisely the argument of Thomas Kopfensteiner, "Science, Metaphor, and Casuistry," in *The Context of Casuistry* 207–20. In a different vein, Edward Long argued years ago that casuistry was needed to apply the absolute ideal of love to the concrete; see his *Conscience and Compromise: An Approach to Protestant Casuistry* (Philadelphia: Westminster, 1954).

⁹ "The Allen-Parsons Cases," in *Elizabethan Casuistry*, ed. Peter Holmes (London: Catholic Record Society, 1981) 63. Johann P. Sommerville argues that among 17th-century English Roman Catholic, Anglican, and Puritan writers there is greater similarity than previously acknowledged in their attempts to deal with equivocation; see his "The 'New Art of Lying': Equivocation, Mental Reservation, and Casuistry," in *Conscience and Casuistry in Early Modern Europe*, ed. Edmund Leites (New York: Cambridge University, 1988) 159–84. Much work has been done on 17th-century English casuistry, especially among Protestants: Kevin Kelly, *Conscience: Dictator or Guide? A Study in Seventeenth-Century English Protestant Moral Theology* (London: Geoffrey Chapman, 1967); Henry McAdoo, *The Structure of Caroline Moral Theology* (London: Longmans, 1949); John McNeill, "Casuistry in the Puritan Age," *Religion in Life* 12 (Winter 1942–43) 76–89; Elliot Rose, *Cases of Conscience: Alternatives Open to Recusants and Puritans under Elizabeth I and James I* (New York: Cambridge University, 1975); Thomas Wood, *English Casuistical Divinity during the Seventeenth Century* (London: SPCK, 1952). More recently, James Keenan, "William Perkins (1558–1602) and the Birth of British Casuistry," in *The Context of Casuistry* 105–30, and "Casuistry," in *The Oxford Encyclopedia of the Reformation* (New York: Oxford University, 1995); Richard Miller, "Moral Sources, Ordinary Life, and Truth-telling in Jeremy Taylor's Casuistry," in *The Context of Casuistry* 131–58.

summarum, que Sylvestrina dicitur (1514) by the Dominican Sylvester Prierias Mazzolini, which used circumstances to establish more definitively the specific nature of a sin.¹⁰ But in the evangelization of the 16th century, many religious orders, especially the Jesuits, came into closer collaboration with lay people, through educational institutions, spiritual direction, and confraternities. In the confessional, these priests encountered not simply a disease that needed attention or a crime demanding sentencing but a struggling Christian seeking consolation. To appreciate the uniqueness of the penitent's particular struggle, Jesuits inquired as specifically as possible into the circumstances affecting the sinner's conduct. These circumstances turned more closely on the person than on the act and, rather than being tools for applying the law, they were used to understand the penitent. This descent into the particular took the confessor so far away from the manuals that those directives were no longer helpful.¹¹ Confessors turned not to these ineffective categories, but to particular cases embellished with personal circumstances. This study of cases became so important to the Jesuits that Jerome Nadal recommended that Jesuit confessors study cases an hour daily.¹²

In the face of antiquated principles, 16th-century ethicists attentive to the newness of contemporary projects turned for guidance to cases, circumstances, new distinctions, and analogous logic. Similarly, at the end of the 20th century, we face new horizons in medical advances, international business, the geopolitical world, and information technology that pose an unimaginable set of new ethical questions, many of which urge a return to casuistry.

A Method Based on Analogy, Taxonomies, and Paradigms

The case of Simon stands between two major cases that enjoy considerable certainty. On the one hand, there is the standard case of a religious order's candidate being required to undergo an exhaustive physical exam. On the other hand, there is the specific case of the

¹⁰ On the evolution of casuistry and the institution of confession, see Miriam Turrini, *La coscienza e le leggi: Morale e diritto nei testi per la confessione della prima età moderna* (Bologna: Il Mulino, 1991); Thomas Tentler, *Sin and Confession on the Eve of the Reformation* (Princeton: Princeton University, 1977). See Tentler's debate with Leonard Boyle, "The Summa for Confessors as an Instrument of Social Control," and "The Summa for Confessors as a Genre, and its Religious Intent," in *The Pursuit of Holiness in Late Medieval and Renaissance Religion*, ed. Charles Trinkhaus and Heiko Oberman (Leiden: E. J. Brill, 1974) 103–25 and 126–30. Also R. M. Henley, "Casuistry," in *The Encyclopedia of Religion and Ethics*, ed. James Hastings, vol. 3 (New York: Charles Scribner's Sons, 1928) 239–47.

¹¹ On the unique role that circumstances played in confession, see Margaret Sampson, "Laxity and Liberty in Seventeenth-Century English Political Thought," *Conscience: Dictator or Guide* 72–118, esp. 76, 96, 103, 116.

¹² John O'Malley, *The First Jesuits* (Cambridge, Mass.: Harvard University, 1993) 136–52; on Nadal, see 147.

president of a small poor school district who seeks to test for HIV all applicants for teaching positions precisely to screen out those who may drain their financial or personnel resources.

In comparison with the first case, Simon's case seems weaker. This religious order, more than a monastic community of prayer, needs to ascertain the health of its manpower for apostolic work. Moreover, Simon's prognosis is seemingly incompatible with the order's need to form its men for ministry over an extended length of time. Will Simon's health last through formation? Will he ever do apostolic work? Furthermore, his health needs will probably strain the order's financial resources that might otherwise be used for apostolic work. Finally, since the community needs to be available for ministry, the catastrophic illness of a member, particularly a younger member at a time of diminishing numbers, severely affects a community.

In comparison with the second case, however, Simon's application stands on stronger ground. Unlike the easier case of an employer who attempts to screen simply in order to protect her own financial interests, here a concerned local official, in the interests of others, attempts to screen out those who are perceived to be eventual liabilities in the particular service of teaching. Nonetheless, American ethical and legal consensus argues against such testing in any employment with the controversial exception of the military and foreign service: HIV testing cannot be used by a municipality, school, or employer as a means to discriminate.¹³ Second, the American hierarchy has gone on record against such discrimination: "We oppose the use of HIV antibody testing for strictly discriminatory purposes. . . . The Catholic Church in the United States accepts its responsibility to give good example in this matter."¹⁴ Third, the social construction of our consideration of HIV and AIDS is dramatically changing. As Albert Jonsen has noted, "The public language . . . of AIDS is as important as the science."¹⁵ We now realize that HIV and AIDS are realities with which someone lives. The notion of living with the infection has empowered not simply the person infected with HIV, but our entire society (medical professions, the pharmaceutical industry, employers, etc.) to face this crisis. The decision to test potential teaching candidates with discriminatory intent ignores the progress society has made in understanding and speaking about HIV. Finally, since testing HIV positive is not absolutely predictive of AIDS,¹⁶ because per-

¹³ L. Gostin, "The AIDS Litigation Project," *Journal of the American Medical Association* 263 (1990) 2086-93.

¹⁴ Administrative Board of the U.S. Catholic Conference, "The Many Faces of AIDS: A Gospel Response," *Origins* 17 (December 24, 1987) 481-89, at 485; see the "Pastoral Statement of the U.S. Catholic Bishops on Handicapped People," Nov. 15, 1978, in "Called to Compassion and Responsibility," *Origins* 19 (November 30, 1989) 421-34.

¹⁵ Albert Jonsen, "Foreword," in *The Meaning of AIDS*, ed. Eric Juengst and Barbara Koenig (New York: Praeger, 1989), as quoted in Smith, *AIDS, Gays* 59.

¹⁶ Natural history studies show that 5-10% of HIV-infected individuals have no signs of immune compromise even after 15 years of infection; see Susan Buchbinder, "Healthy Long-Term HIV Positive: Viral Burden and Cell-Mediated Immunity," *Tenth Interna-*

sons who are infected are now known to have greater probable longevity, and since too we can reasonably assume that therapeutic interventions in the even near future may significantly alter the overall prognosis of persons testing positive, it seems proper to describe a person testing positive as having a chronic infection that could lead to a life-threatening disease.

This teaching case is evidently similar to the case of Simon, except for the major difference that one person is looking for a teaching position and the other is looking to incorporate himself into a religious community of apostolic service. That difference, however, is quite significant. Thus the courts do not enjoin religious communities to desist from testing. Moreover, the American bishops noted in a later document that it "may be appropriate for seminaries and religious communities to screen for the HIV antibody. . . . The point here is not to automatically exclude a candidate who is HIV positive; but rather to discern carefully this person's present health situations as well as future health prospects; and thus to make an overall moral assessment of an individual's capacity to carry out ministerial responsibilities."¹⁷ Thus the teaching case highlights the wrongness of discrimination even for "service" reasons, but it is only comparable and not identical with the case of Simon. Nonetheless, the discrimination issue in cases like Simon's does prompt the bishops to reject a blanket practice of exclusion based on testing. Yet, and this is why it is interesting, Simon's case is built precisely on the single issue of testing positive.

This inductive method of comparing cases Jonsen and Toulmin call "taxonomy." Rather than being described as the deductive application of a principle to a case, high casuistry is the comparison of one or more cases, which already enjoy a successful resolution, against a new case. This comparison helps bring to light the morally relevant circumstances that become decisive in determining the outcome of any case. Moreover, in the absence of relevant principles, the cases already successfully resolved become the standards against which to measure the circumstances of the new case. These standard cases Jonsen and Toulmin call "paradigms."¹⁸ We have seen instances of them not only in the "physical exam" and "teaching applicant" cases, but in the cases of the captain of the ship and of Jesus at Emmaus.

This taxonomic use of casuistry differs considerably from the standard understanding of casuistry that was current from the 18th cen-

tional Conference on AIDS, Yokohama, Japan (August 7–12, 1994) Abstract 007C, vol. 1, p. 8; Yunzhen Cao et al., "Virologic and Immunologic Characterization of Long-Term Survivors of Human Immunodeficiency Virus Type I Infection," New England Journal of Medicine 332 (1995) 201–8; Giuseppe Pantaleo et al., "Studies in Subjects with Long-Term Nonprogressive Human Immunodeficiency Virus Infection," ibid. 209–16.

¹⁷ "Called to Compassion and Responsibility" 434 n. 45.

¹⁸ Jonsen and Toulmin, *The Abuse of Casuistry* 251–59. See Richard Miller's use of the just-war paradigm in order to analyze the issues concerning the use of cadaverous tissue ("On Transplanting Human Fetal Tissue: Presumptive Duties and the Task of Casuistry," *Journal of Medicine and Philosophy* 14 [1989] 617–40).

tury until the Second Vatican Council, that is, during the period when moralists wrote manuals to differentiate permitted from sinful activity. In that geometric casuistry, existing principles were simply applied deductively to a case and the case was solved. In geometric or manualist casuistry, it is a principle¹⁹ and not the case that is the standard. Rather than measuring other cases, the case in this form of casuistry is simply measured. One clear example of geometric casuistry is the application of the principle of double effect.²⁰ This type of casuistry, which the manualists promoted, existed in part because of the lack of doubt about principles and other ways of proceeding.²¹ The certitude apparent in church moral teaching in the two centuries prior to the Second Vatican Council is striking. But on occasion, some issues emerged that raised new questions. In those moments of uncertainty, where conclusive principles were not available, the manualists turned to taxonomy.²² Charles Curran brought this shifting of methods to light in his essay on the casuistry of Aloysius Sabetti, the Neapolitan Jesuit who taught at Woodstock College at the end of the 19th century.²³ Likewise, one finds years ago in the "Notes on Moral Theology" in this journal that manualists such as John Ford and Gerald Kelly used taxonomies on such then-new issues as race integration, organ transplants, and carpet bombings.²⁴ The newness of these issues prompted recourse not to principles geometrically applied to a case, but in the absence of principles, to the use of cases as paradigms to measure other cases taxonomically.

Selecting Cases, Discovering Maxims, Weighing Circumstances

The case of Simon presents the unique situation of a religious community facing apostolic responsibilities, yet realizing that their

¹⁹ Principles could be material ones such as justice or autonomy, or formal methodological ones such as double effect or cooperation.

²⁰ For discussion of how the principle applied geometrically often violates its taxonomic roots, see my "The Function of the Principle of Double Effect," *TS* 54 (1993) 294–315.

²¹ This certitude is not necessarily consoling. Jonsen and Toulmin narrate how often the Greeks, Romans, and Jews preferred to depend on the prudential verdicts of their judges; only when they lacked such leadership did they rush to formulate specifically worded laws (*The Abuse of Casuistry* 47–88). The turn to written law is often the turn away from the exercise of human prudence; see the interesting article by John Treloar, "Moral Virtue and the Demise of Prudence in the Thought of Francis Suarez," *American Catholic Philosophical Quarterly* 65 (1991) 387–405.

²² See Jean-Marie Aubert's remark that the casuist considers the terrain between law and liberty ("Morale et casuistique," *Recherches de sciences religieuses* 68 [1980] 167–204, at 203).

²³ Charles Curran, "The Manual and Casuistry of Aloysius Sabetti," in *The Context of Casuistry* 188–204.

²⁴ On transplants, see Gerald Kelly, "Pope Pius XII and the Principle of Totality," *TS* 16 (1955) 373–96; on ectopic pregnancy and on the rights of black Catholics, see his "Notes in Moral Theology," *TS* 8 (1947) 97–117; for probably the most significant (and prophetic) casuistry done in these pages, see John Ford, "The Morality of Obliteration Bombing," *TS* 5 (1944) 261–309.

internal policies should reflect an understanding of fairness that pervades society. Without any determining principle, the admissions committee turns with its case to the paradigms and detects within them general maxims. These maxims—e.g., that “candidates ought to be physically suitable” and that “religious orders ought not to discriminate”—enter into the inductive reasoning process not as principles from which we can deduce right practice, but rather as indicators of how we ought to proceed generally in our deliberations. They are abbreviated principles that effectively serve as rules of thumb.²⁵

As maxims emerge through these taxonomies, so do circumstances. For instance, faced with the obligation to know a candidate’s “present and future physical condition,” the admissions committee needs to know when Simon contracted the virus and what has been the clinical history of the virus in his life. The Jesuit physician and AIDS expert Jon Fuller suggests that “for those who are found to be antibody positive, a more detailed clinical evaluation by an experienced physician could be obtained in order to more accurately locate the individual along the continuum of the natural history of HIV infection.”²⁶ Likewise, members of the admissions committee must consider the length of their own formation program as well as the training and experience that Simon has already had. Similarly they need to know their order’s personnel and financial resources as well as how hospitable their members would be to a new community member infected by the virus. These circumstances are not tangential; rather they are the material out of which a determination must be made.

Thus further circumstances might be added to Simon’s case, describing both a man whose clinical history is very promising and whose education parallels the order’s formation program, and an order known for its hospitality and ability to absorb the personnel and financial demands that might be presented by the possibility of Simon’s developing AIDS. If these particular details do emerge,²⁷ then the case of Simon becomes a “hard” case. A “hard” case is that type of case that forces us to rethink all our presuppositions on a particular matter, in this case the presumed unsuitability of a candidate who tests HIV positive.²⁸

Anyone familiar with the history of usury recalls the “hard case” of

²⁵ Throughout *The Abuse of Casuistry* Jonsen and Toulmin discuss maxims; see also Jonsen’s “Casuistry: An Alternative or Complement to Principles,” *Kennedy Institute of Ethics Journal* 5 (1995) 237–51.

²⁶ Fuller, “HIV-Considerations” 73.

²⁷ John Arras argues that cases ought to be long, “richly detailed and comprehensive” in order to plumb the narrative and the circumstances (“Getting Down to Cases: The Revival of Casuistry in Bioethics,” *Journal of Medicine and Philosophy* 16 [1991] 29–51, at 29). The case of Simon is presented precisely to highlight the need to consider circumstances.

²⁸ On the need for hard cases, see David Blake, “The Hospital Ethics Committee,” *Hastings Center Report* 22 (1992) 6–11.

the triple contract, which provided ethicists with the substantive circumstances that finally prompted assent to a particular form of money lending.²⁹ In this century, in the aftermath of *Humanae vitae*, proportionalists proposed a variety of "hard" cases³⁰ to test whether the absolute and universal claims of the encyclical were adequate in anticipating all the circumstantial possibilities that demanded moral recognition.³¹ Likewise, the hard case of abortion has often been attempted in moral literature.³² More recently we find the celebrated hard case of "Dax," the burn patient treated against his own wish to die.³³

These hard cases reveal how casuistry is "[r]hetorical reasoning applied to moral matters."³⁴ These hard cases are not designed simply to break down rules or principles. Rather they reveal any unspoken biases or unacknowledged presuppositions operative in the deliberating processes of community leaders. Stanley Hauerwas writes: "Casuistry is the mode of reflection a community employs to test imaginatively the often unnoticed and unacknowledged implications of its narrative commitments." In his theology of Christian narrative, he sees casuistry as "a necessity because it provides the means by which we learn

²⁹ John T. Noonan, Jr., *The Scholastic Analysis of Usury* (Cambridge, Mass.: Harvard University, 1957) 202–29.

³⁰ See Richard McCormick's comments in "Moral Theology: 1940–1989: An Overview," *TS* 50 (1989) 3–24, esp. 11–12. Of course McCormick is the quintessential casuist; see him at work in *The Critical Calling* (Washington: Georgetown University, 1989); *How Brave a New World* (London: SCM, 1981); *Notes on Moral Theology 1965–1980* (Washington: University Press of America, 1981); *Notes on Moral Theology 1981 through 1984* (Lanham, Md.: University Press of America, 1984). The first sentence in the first entry (1965) of his "Notes" reads, "For quite a few years now, theologians have, without disowning casuistry, disowned an excessively casuistic approach to the moral life," and later in the same "Note" he writes against those who "decontextualize" casuistry. For an enjoyable use of casuistry on similar material, see John Dedek, *Titius and Bertha Ride Again* (New York: Sheed and Ward, 1974).

³¹ Josef Fuchs, "The Absoluteness of Behavioral Moral Norms," *Personal Responsibility and Christian Responsibility* (Washington: Georgetown University, 1983) 115–52.

³² In 1970, while highlighting the different approaches between Catholic and Protestant ethicists, James Gustafson proposed an abortion case in which the circumstances raised the sympathy of any reader: a woman in her 20s, whose alcoholic mother and drug addicted father abused her three children, is divorced from her husband who is given custody of the children. Alone, struggling, unemployed, and suffering from gastrointestinal illness, she finds herself pregnant after being raped by her former husband and his three friends ("A Protestant Ethical Approach," in *The Morality of Abortion*, ed. John T. Noonan, Jr. [Cambridge, Mass.: Harvard University, 1970] 101–22, at 107).

³³ *Dax's Case: Essays in Medical Ethics and Human Meaning*, ed. Lonnie Kliever (Dallas: Southern Methodist University, 1989); William F. May, *The Patient's Ordeal* (Bloomington: Indiana University, 1991); Sumner Twiss, "Alternative Approaches to Patient and Family Medical Ethics," *Review Studies* 21 (1995) 263–76.

³⁴ Albert Jonsen, "Casuistry: An Alternative or Complement to Principles," *Kennedy Institute of Ethics Journal* 5 (1995) 237–52, at 241. On the relationship between casuistry and rhetoric, see *The Abuse of Casuistry* 60–88; Franco Mormando, "To Persuade Is a Victory: Rhetoric and Moral Reasoning in the Sermons of Bernardino of Sienna," in *The Context of Casuistry* 55–84.

to check our particular telling of the story of God with the way our community is."³⁵

The case of Simon undoubtedly affects many readers of these pages. Of course, the selection of a case is itself significant: it sets a moral agenda. Likewise, the selection of paradigm cases steers deliberations. But both choices appear in the open and are subject to debate. The new casuistry is done in public. No longer is the casuist one among other casuists who privately determine solutions and promulgate decisions. Those casuists, whether belonging to the high casuistry of the 16th and 17th century or to the manualist tradition from the 18th century until the Second Vatican Council, never bothered to articulate their method. Casuistry was a members-only science.³⁶ But today the casuist presents the morally relevant materials and becomes a "decision facilitator" in collective practical reasoning.³⁷ The casuist is more interested in presenting the case, considering the paradigms, unearthing the maxims, revealing the circumstances, and testing the biases. Today's casuist knows the method, not the answers.

The selection of the case of Simon not only raises concerns about AIDS, discrimination against persons with disabilities, and genetic screening, but also demonstrates another departure from manualist casuistry. Besides making changes in the method of casuistry and the role of the casuist, we are also departing from the content of manualism. Richard McCormick well describes manualist casuistry in these terms: "Concretely, it was all too often one-sidedly confession-oriented, magisterium dominated, canon law-related, sin-centered, and seminary controlled."³⁸ Now, however, the case of Simon is not being decided by a casuist, but by a committee; it is not about sin, but about membership; it is not about the private actions of individual lay people, but about the practical policies of those who minister in the Church; it is for the consideration not of manualists, but of the readership of this journal. The "hard" case of Simon challenges the agenda about who decides what about whom and how.

Still, few cases are "hard." Usually, casuistry is simply the attempt to solve one situation by an appeal to the congruencies with one or two paradigm cases. On occasion it also is the development of cases in order

³⁵ Stanley Hauerwas, "Casuistry as a Narrative Art," *Interpretation* 37 (1993) 377–88, at 381 and 377.

³⁶ See *The Abuse of Casuistry* 250–51; and my "The Casuistry of John Mair" 96–97.

³⁷ Richard Zaner, "Voices and Time: The Venture of Clinical Ethics," *Journal of Medicine and Philosophy* 18 (1993) 9–31. John Arras, David Blake, and Kathryn Montgomery Hunter address the pedagogical process of casuistry particularly in the selection of cases; see Hunter, "A Science of Individuals: Medicine and Casuistry," *JMP* 14 (1989) 193–212. Also Robin Downie, "Health Care Ethics and Casuistry," *Journal of Medical Ethics* 18 (1992) 61–62, 66.

³⁸ McCormick, "Moral Theology 1940–1989" 3; McCormick adds "qualifiers" to this statement.

to afford a progressive consideration of the effect that particular circumstances make on moral judgment. Eventually the casuist, by entertaining a variety of circumstances, exposes the morally defining ones that make a new case morally different from the original one. Jonsen and Toulmin demonstrate this through a study of high-casuistry cases concerning profit, perjury, and pride.³⁹ In an analogous way, John Noonan studies the mutation of old rules by the introduction of cases with new circumstances that shape both the meaning and the significance of the rule; after a lengthy process of development new prescriptives are even articulated.⁴⁰ By way of summary, John Arras writes: "In contrast to the deductivist method whose principles glide over the facts, the principles of the new casuistry are always subject to further revision and articulation in light of new cases."⁴¹

Principles, Contexts, Resolution, and Virtues

At this point in the case, the circumstances that the committee needs for a determination are outstanding, and thus there can be no resolution to the case at hand. Yet, engaging the case itself prompts a consideration of previously unexamined presuppositions. For example, how detrimental to an order's apostolic work would it be to admit a man who has a healthy prognosis, a deep vocation, and good ministerial formation, but is HIV positive? Does not the case invite us to recognize the reality of ministering in a time of AIDS? Does it not help us imagine such a candidate as a possible benefit to the order's apostolic work? Could we not entertain some specific charisms that he might bring regarding compassion, hospitality, a sympathy for disability? Moreover, is there not some way that Simon's case could become a paradigm for other candidates with chronic conditions or disabilities? Could we not consider the case of a person who is wheel-chair bound or blind or hearing impaired? Simon's case could generate through circumstantial changes a whole series of cases that bring to light the operative biases in our own thought processes. Along the way those cases begin to challenge the priority that the physical exam may have in admitting candidates. At least Simon's and related cases challenge the assumption that physical suitability can or should be a final arbiter in determining the acceptability of a vocation.

But the case also prompts the admissions committee to recognize that since the application of a person who tests HIV positive cannot be rejected automatically, the only way they will determine a candidate's suitability will be precisely on a case-by-case basis. That is to say, the case of Simon demonstrates the need for casuistry. Moreover, years

³⁹ *The Abuse of Casuistry* 177–227.

⁴⁰ John T. Noonan, Jr., "Development in Moral Doctrine," *TS* 54 (1993) 662–77; reprinted in *The Context of Casuistry* 188–204.

⁴¹ Arras, "Getting Down to Cases" 35.

from now, after more candidates who are HIV positive and other candidates with more apparent disabilities are accepted, in the light of that experience and of the insights derived from the years of that casuistry, the committee may be able to articulate a rule or principle that can guide them. But even then that rule will still need to meet the challenge of cases and the claims of specific circumstances.

This process reveals to us the origin of principles and rules. The priority of practices and cases over principles is the subject of some discussion in ethics today. John Kekes provides three arguments against the "received opinion . . . that moral conduct is guided primarily by principles." Principles express already accepted conduct; they are "extracted from conventional conduct prevailing in the society." Moreover, they are revised or rejected to the extent that they conform to our "prevailing practice" and their developments are conditioned by the social practices that originally validated them. Finally, the principle has force to the degree that the practice is commonly accepted. In sum, principles are derived from conventional conduct: considerations of expression, revision, and acceptance of principles show that "practice is primary and principles are secondary."⁴² Likewise Martha Nussbaum writes with an Aristotelian assumption that "principles are perspicuous descriptive summaries of good judgments, valid only to the extent to which they correctly describe such judgments."⁴³ Elsewhere she states "a good rule is a good summary of wise particular choices and not a court of last resort."⁴⁴

Casuists have taken these insights and insisted that, prior to principles, casuistry engages the concrete. Moreover, after years of taxonomies, they recognize and determine the least common denominators among the new solutions of comparable cases and thus articulate and generate these into rules and even principles. On these points, Jonsen and Toulmin challenge those who argue otherwise, the principlists. Toulmin begins the debate by arguing that casuistry returns ethics to the realm of practical science.⁴⁵ The vocation analogous to that of the casuist is no longer the speculative geometer with theorems and axioms, but the attending physician with practical problems all about. Against the principlists who have their point of departure in theory, Toulmin writes that the task of the casuist is "to refer difficult cases arising in marginal or ambiguous situations to simpler, more nearly paradigmatic examples and to consider how far the simpler

⁴² John Kekes, *The Examined Life* (Lewisburg: Bucknell University, 1988) 50.

⁴³ Martha Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (New York: Cambridge University, 1986) 299.

⁴⁴ Martha Nussbaum, "Non-Relative Virtues: An Aristotelian Approach," *Midwest Studies in Philosophy* 13: *Ethical Theory: Character and Virtue*, ed. P. French, T. Uehling, and H. Wettstein (Notre Dame: University of Notre Dame, 1988) 44.

⁴⁵ Stephen Toulmin, "The Recovery of Practical Philosophy," *The American Scholar* 57 (1988) 337-52.

examples can guide us in resolving the conflicts and ambiguities that awaken our moral perplexity."⁴⁶

Toulmin believes that our society relies too heavily and mistakenly on principles: "In law, in ethics, and in public administration alike, there is nowadays a similar preoccupation with general principles and a similar distrust of individual discretion." He recommends that by being like the physician the casuist could consider first the concrete problems at hand through a variety of resources and not merely through principles that so often "glide over the facts."⁴⁷ Jonsen agrees: "Justification of any particular moral claim comes rarely from a single principle, as many theories would like, but usually from the convergence of many considerations, each partially persuasive but together convincing with plausible probability. . . . The weight of any ethical considerations comes, not from the principles or maxims invoked, but from the more fact-like considerations that are piled onto practical judgment."⁴⁸ Toulmin adds that the principilists are rejecting his claims because the "[c]asuists reverse the relationship between theory and practice."⁴⁹ The casuists argue that their practices and solutions eventually articulate the principles; the principles do not solve the cases. Casuistry, when it pauses for a moment from practice and enters the world of theory, makes rules and principles.⁵⁰

Jonsen believes our present reliance on principles to determine morally right conduct is entrenched in Puritan and Jansenist thought: "Moralism is absolutist in the etymological sense, namely, it tends to remove (absolvere) a moral problem from the actual circumstances of moral action."⁵¹ Despite that distrust of principles censoring moral data, Jonsen recently described casuistry as an imaginary building where the frame is set in principles, but the entire make-up of the house, from mortar to furniture is constituted by circumstances; he added that "[p]rinciples and circumstances are complementary in a complex and subtle way."⁵² A principilist, Tom Beauchamp, sees a shift in Jonsen's writing here and argues that Jonsen seems to be admitting

⁴⁶ Stephen Toulmin, "Casuistry and Clinical Ethics," in *A Matter of Principles?* ed. Edwin DuBose et al. (Valley Forge: Trinity International, 1994) 310–20, at 314.

⁴⁷ Stephen Toulmin, "The Tyranny of Principles," *The Hastings Center Report* 11 (1981) 31–39, at 34.

⁴⁸ Albert Jonsen, "Of Balloons or Bicycles, Or the Relationship between Ethical Theory and Practical Judgment," *Hastings Center Report* 21 (1991) 14–16, at 15.

⁴⁹ Toulmin, "Casuistry and Clinical Ethics" 310.

⁵⁰ Amy McCreedy, "Milton's Casuistry: the Case of *The Doctrine and Discipline of Divorce*," *Journal of Medieval and Renaissance Studies* 22 (1992) 393–428; Milton held that Jesus himself was a casuist.

⁵¹ Albert Jonsen, "American Moralism and the Origin of Bioethics in the United States," *Journal of Medicine and Philosophy* 16 (1991) 113–30, at 120.

⁵² Jonsen, "Casuistry: An Alternative or Complement to Principles" 249.

a dialectic between cases and principles.⁵³ Another principlist, James Childress, charges that in Jonsen's own writings one can find principles functioning which are "prima facie or presumptive rather than absolute, but they are more than maxims." Childress admits that he and Beauchamp have become more aware of how cases revise principles, and he acknowledges that the relationship between cases and principles may be more dialectical than he recognized.⁵⁴ So these principlists are moving toward more inductive logic.

Often enough cases and principles do engage each other dialectically.⁵⁵ We saw, for instance, that high casuistry began that way: cases acknowledged yet reshaped principles and even redefined the objects (like usury) of moral reflection. But the real issue of casuistry is not its relationship to principles or their abbreviated and less demanding maxims, but its claim to be "pretheoretical."⁵⁶ In the concrete world where clinical ethics are at work or where admissions committees meet, in the world where theory is neither well known nor much used, in that world people deliberate morally, inductively, attentive to circumstances. They may eventually generate a rule, perhaps even a principle, thereby contributing to the world of theory. But for the most part they will be pretheoretical in their practical reasoning through cases.

Casuistry's insistence on the concrete is an insistence on the pretheoretical.⁵⁷ In fact, because it is concrete and pretheoretical, it is context-dependent. Thus, speaking of the suitability of casuistry for clinical ethics, Kathryn Hunter writes that "[b]ecause the uncertainties of diagnosis and prognostication are fundamental to medicine, the methods which physicians have devised to meet them are a fundamental part of the discipline."⁵⁸ Likewise casuistry suitable for admissions committees, parent groups, confessors, lawyers, etc., is dependent upon the specific contexts in which it is used. As Hauerwas argues, "Casuistry is . . . unintelligible as an activity separated from its communal context."⁵⁹

This combination of turning to the concrete and away from theory

⁵³ Tom Beauchamp, "Principlism and Its Alleged Competitors," *Kennedy Institute of Ethics Journal* 5 (1995) 181–98, esp. 190–93.

⁵⁴ James Childress, "Principles-Oriented Bioethics: An Analysis and Assessment from Within," *A Matter of Principles?* 72–100, at 84.

⁵⁵ Nigel Biggar, "A Case for Casuistry in the Church," *Modern Theology* 6 (1989) 29–51; on this point of dialectics Biggar highlights the achievement of Kenneth Kirk, *Conscience and Its Problems* (London: Longmans, 1948).

⁵⁶ Toulmin sets out this argument in "Casuistry and Clinical Ethics"; see also his account of the confusion caused by casuists with the profusion of circumstantial issues in 16th-century Europe, *Cosmopolis* (Chicago: University of Chicago, 1990) esp. 5–44.

⁵⁷ Klaus Demmer notes that casuistry calls us to recognize the historicity of truth in moral reasoning ("Erwägungen über den Segen der Kasuistik," *Gregorianum* 63 [1982] 133–40).

⁵⁸ Hunter, "A Science of Individuals" 194.

⁵⁹ Hauerwas, "Casuistry as Narrative Art" 387.

while being context-dependent has attracted some recent, encouraging feminist comment.⁶⁰ It has also prompted Jonsen and Toulmin to modify some of their earlier claims that casuistry can operate free of the differing presuppositions that participants in deliberations may have.⁶¹ The point of reference to the pretheoretical implicitly acknowledges that the final arbiter of any case is not a principle, but practical reason. Kevin Wildes adds that casuistry cannot operate in a vacuum; it requires context.⁶² The turn to context requires those who are deliberating to ask themselves whether they share any fundamental presuppositions, for they will only be able to agree if they share some moral sense and purpose. Indeed, casuistry involves as much a recognition about ourselves and our circumstances as it does a resolution about cases.

On this idea of context dependency, I close. Elsewhere I have argued that casuistry, because it is context dependent, is simply a rhetorical and reasoning method.⁶³ It is content free: in the hands of a Puritan or a Jesuit, a secular humanist or an orthodox Jew, casuistry helps its user to recognize the claims of circumstances, to examine long-held beliefs, to challenge existing principles, and to develop new guides. But in all these instances the reasoning of a particular individual or group of individuals is being engaged. Thus they must place themselves in some sort of defining context, for "[t]he greatest limitation of casuistry is an inability to be self-purifying."⁶⁴

Jonsen and Toulmin acknowledge that one reason for the collapse of high casuistry is that it had no *telos*, no expressed goal. Casuistry still does not have one today, because a *telos* is intrinsic not to method but to intentionality. For that reason, those who use casuistry need to ask what they are aiming at. I add, however, that they should ask questions not only about the intentionality of action, but more importantly about character. In other words, I believe that those interested in using casuistry must ask the key questions about virtue—about who they are and who they ought to become—questions about self-under-

⁶⁰ Marcia Sichel, "Women and the New Casuistry," *Thought* 67 (1992) 148–57. See also A. Cheree Carlson, "Creative Casuistry and Feminist Consciousness: The Rhetoric of Moral Reform," *Quarterly Journal of Speech* 78 (1992) 16–32; Dena Davis, "Abortion in Jewish Thought: A Study in Casuistry," *Journal of the American Academy of Religion* 60 (1992) 313–24; Kathy Rudy, "Thinking Through the Ethics of Abortion," *Theology Today* 51 (1994) 235–48.

⁶¹ See their *The Abuse of Casuistry* 1–20.

⁶² Kevin Wildes, "The Priesthood of Bioethics and the Return of Casuistry," *Journal of Medicine and Philosophy* 18 (1993) 33–49, at 45. See the subsequent debate: James Tallmon, "How Jonsen Really Views Casuistry: A Note on the Abuse of Father Wildes," *JMP* 19 (1994) 103–13; Kevin Wildes, "Respondeo: Method and Content in Casuistry," *JMP* 19 (1994) 115–19.

⁶³ James Keenan and Thomas Shannon, "Contexts of Casuistry: Historical and Contemporary," in *The Context of Casuistry* 221–31; Keenan, "Virtue Ethics: Making a Case as It Comes of Age," *Thought* 67 (1992) 115–27.

⁶⁴ Long, *Conscience and Compromise* 147.