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Thomas Aquinas, John Noonan, and the Usury Prohibition

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Introduction

The Catholic Church's longstanding usury prohibition is today widely considered defunct. In contemporary capitalist societies a certain opprobrium attaches to "usury," in the popular sense of charging *excessive* interest on a loan, but lending at interest is otherwise accepted as a normal and necessary feature of economic life. Few within or without the Church (except Muslims) object to "usury" in the original sense of charging even low interest on a loan, absent any title beyond the mere act of lending.[1] Recent popes have sometimes condemned "usury," but it is unclear whether they have used the word in its popular or in its original sense.[2] While the

1 The change in the word's meaning (already well established by the time of Adam Smith) reflects the post-Renaissance change in the common European moral evaluation of lending at interest. The same is true of the change in meaning of "interest" (*interesse*), which originally referred to penalty for default on, or late payment of, a non-usurious loan. See Joseph Persky, "Retrospectives: From Usury to Interest," *The Journal of Economic Perspectives* 21, no. 1 (Winter, 2007): 227–30. For convenience, in this essay I will use the term "interest" in the broad contemporary sense of any sum that a borrower agrees to pay in addition to the principal.

2 Both Pope (now emeritus) Benedict XVI and Pope Francis have passionately condemned "usury" in addresses to members of Italy's Consulta Nazionale Antiusura, without defining the term. The website of the Consulta, whose work both Popes praised highly, defines usury as "the offense committed by someone who, exploiting another individual's need for money, grants a loan while asking for repayment at an interest rate higher than the so-called 'threshold rate' [*tasso soglia*] allowed by law" ("L'Usura," consultantiusura.it/usura.html; translation mine). The Consulta evidently understands "usury" in the contemporary sense of charging *excessive* interest. This suggests that the condemnations of usury in the Popes' addresses to the

Catechism of the Catholic Church denounces "usurious and avaricious dealings" that lead to "hunger and death," it nowhere prohibits usury as such.[3] The 1983 Code of Canon Law is silent about it. On the whole, John T. Noonan Jr.'s observation in the introduction to his classic 1957 study *The Scholastic Analysis of Usury* remains valid: "Usury today is a dead issue, and except by a plainly equivocal use of the term, or save in the mouths of a few inveterate haters of the present order, it is not likely to stir to life."[4]

Yet the Church has never rescinded its usury prohibition; nor could it do so, given the prohibition's history.[5] The grave sinfulness of usury was clearly and forcefully taught over many centuries by Church Fathers, local and ecumenical councils, Scholastic theologians, and popes,[6] often in the face of widespread, flagrant disregard for the teaching on the part of lay Catholics.[7] Even if one were to argue that it has never been solemnly

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Consulta should also be understood in this sense. (This was certainly the view of the Catholic news service Zenit, when reporting the addresses.) If so, it may well be that when Benedict XVI wrote in *Caritas in Veritate* (2009) that "the weakest members of society should be helped to defend themselves against usury" (§66), he was again using the word in its contemporary sense (English from the version available on his webpage on the Vatican website).

3 *Catechism of the Catholic Church* [*CCC*], 2nd edition (Strathfield, Australia: St. Pauls, 2000), §2269. The index to the Catechism defines "usury" simply as "lending money at interest" (p. 856). *CCC* §2449 mentions a number of provisions in the Mosaic law intended to ease the burdens of the poor and needy, including the "prohibition of loans at interest." There is no indication here that the prohibition might also belong to the natural law. Moreover, there is no suggestion that lending at interest might be sinful even when the borrower happens to be wealthy. Put differently, there is no suggestion here that usury might be *intrinsically* unjust.

4 John T. Noonan Jr., *The Scholastic Analysis of Usury* (Cambridge, MA.: Harvard University Press, 1957), 1.

5 The theological roots of the prohibition are, of course, biblical. No New Testament passage unambiguously condemns usury, though both in the patristic period and in the Middle Ages Christ's admonition to "lend freely, hoping nothing thereby" (Luke 6:35) was often taken to support the usury prohibition. Some of the relevant Old Testament texts (e.g., Exod 22:25 and Lev 25:35–37) prohibit lending at interest only to fellow Israelites. However, Ps 14:5 (Septuagint numbering) and Ezek 18:5–9 both contain apparently unrestricted (though only implicit) condemnations of usury.

6 Robert Maloney provides a concise but helpfully detailed presentation of patristic attitudes towards usury in "The Teaching of the Fathers on Usury: An Historical Study on the Development of Christian Thinking," *Vigiliae Christianae* 27, no. 4 (1973): 241–65. The Scholastic, conciliar, and papal condemnations are comprehensively documented in Noonan's *Scholastic Analysis*.

7 In 1179, more than forty years before the birth of Thomas Aquinas, the Third Lateran Council lamented that "nearly everywhere the crime of usury has become so

defined in an exercise of the Church's extraordinary magisterium,[8] one could not plausibly deny that usury's sinfulness has been infallibly taught by the universal and ordinary magisterium. As Elizabeth Anscombe observes, though the Church has largely "fallen silent" about usury, its condemnation of the practice is "unretractable."[9]

Noonan himself acknowledged, in 1957, that the sinfulness of usury "was *and is* a dogma of the Catholic Church."[10] Less than ten years later, however, he had apparently changed his mind. In a series of publications beginning shortly after the close of the Second Vatican Council and spanning nearly four decades, he argued that the modern Church has abandoned the usury prohibition. Moreover, it is clear that he found the Scholastic natural-law arguments in its support unpersuasive. Despite describing his 1957 study as no more than "a simple history" of Scholastic thought about usury and its post-medieval reception,[11] he is more than willing to criticize the Scholastics' arguments. He speaks of their "inconsistencies"[12] and

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firmly rooted that many, omitting other business, practice usury as if it were permitted" (can. 25; English from papalencyclicals.net). Charles R. Geist remarks that, while in the later Middle Ages usury "was being practiced by all and sundry in the commercial revolution in Italy and the rest of Europe," Churchmen nonetheless still considered it "an execrable sin against humanity" (*Beggar Thy Neighbor: A History of Usury and Debt* [Philadelphia: University of Pennsylvania Press, 2013], 58).

8 The most plausible candidate for an infallible definition of usury's intrinsic sinfulness is the Council of Vienne's 1311 decree that, "if indeed someone has fallen into the error of presuming to affirm pertinaciously that the practice of usury is not sinful, . . . he is to be punished as a heretic" (can. 29; English from papalencyclicals.net). However, the statement that one who "pertinaciously" affirms that "the practice of usury is not sinful" is to be "punished as a heretic" does not, despite appearances, necessarily mean that the denial of usury's (intrinsic) sinfulness is formally heretical. For a discussion of the difficulties in interpreting the Council's seemingly straightforward decree, see Patrick Cleary, *The Church and Usury: An Essay on Some Historical and Theological Aspects of Money-Lending* (Dublin: M. H. Gill and Son, 1914), 74–78. Cleary nonetheless deems it "probable" that the decree "was meant to be definitive" and that it "defines that usury . . . involves injustice" (78).

9 G. E. M. Anscombe, "Philosophers and Economists: Two Philosophers' Objections to Usury," in *Faith in a Hard Ground: Essays on Religion, Philosophy and Ethics*, ed. Mary Geach and Luke Gormally (Charlottesville, VA.: Imprint Academic, 2008), 247–57, at 249.

10 Noonan, *Scholastic Analysis*, 2–3 (emphasis mine). On 400 he likewise remarks that "the pure and narrow dogma is the same today as in 1200."

11 Noonan, *Scholastic Analysis*, 6: He continues here: "The study does not attempt to demonstrate either the futility and inconsistency or the wisdom and logic of the scholastic position."

12 Noonan, *Scholastic Analysis*, 145, 205.

of their analysis of usury "floundering in severe difficulties" by the early modern period.[13] He has high praise for Aquinas's major natural-law argument against usury and even goes so far as to say that no other Scholastic argument "survived the test of time and criticism,"[14] yet he claims that the Angelic Doctor abandoned the principles of this argument when discussing contracts other than loans, because "the promptings of natural justice are stronger than his theory."[15] (The implication, of course, is that "natural justice" tells against these principles, hence against the "theory" based on them.) Most tellingly of all, when discussing post-medieval developments, he says that "the later writers cannot bear the piecemeal theory and illogical exceptions that made the early teaching tolerable."[16] Though in 1957 he accepted that the Church had never rescinded its prohibition, he believed that the classic natural-law arguments against usury were either incoherent or else "intolerable" and against "natural justice" when rigorously thought out. The post-medieval theological innovations that he would later claim led the Church to rescind the prohibition were, in fact, attempts to remedy the putative difficulties inherent in "the early teaching." In short, Noonan came to believe that it was because natural-law objections to usury were at bottom untenable that the Church finally ceased to teach that usury is intrinsically sinful.

While a small number of recent Catholic commentators both accept that the usury prohibition has never been rescinded and urge its reasonableness and continuing relevance,[17] none has attempted a detailed response to Noonan's arguments. Since Noonan was unquestionably the preeminent twentieth-century authority on the prohibition's history, these arguments deserve close attention. My chief goal in this essay is to make good this lacuna in contemporary Catholic efforts to rehabilitate the prohibition. This may seem an exceedingly ambitious task. As M. Cathleen Kaveny observes, "very few of us have the expertise necessary

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13 Noonan, *Scholastic Analysis*, 355.

14 Noonan, *Scholastic Analysis*, 358.

15 Noonan, *Scholastic Analysis*, 143.

16 Noonan, *Scholastic Analysis*, 201.

17 In addition to Anscombe, "Philosophers and Economists," see: D. Stephen Long and Nancy Ruth Fox, with Tripp Rork, *Calculated Futures: Theology, Ethics and Economics* (Waco, TX: Baylor University Press, 2007); Christopher A. Franks, "The Usury Prohibition and Natural Law: A Reappraisal," *The Thomist* 72, no .4 (2008): 625–60; Brian McCall, *The Church and the Usurers: Unprofitable Lending for the Modern Economy* (Ave Maria, FL: Sapientia, 2013); Thomas Storck, *An Economics of Justice and Charity* (Kettering, OH.: Angelico, 2017).

independently to evaluate Noonan's historical scholarship."[18] I make no pretense of approaching, let alone equaling, Noonan's vast erudition. Yet it is possible to criticize some of his arguments while lacking his historical expertise. One of the merits of his 1957 study is that his presentation of sources is sufficiently detailed and impartial to allow for some independent evaluation of his interpretations. In any case, the evidence that bears directly on Noonan's two most important theses—that the Church has abandoned the usury prohibition, and that Aquinas's argument for usury's intrinsic evil is defective—is not, as we shall see, extensive. Moreover, Noonan's critique of Aquinas stands or falls by its philosophical merits, not by his historical scholarship.

While I believe the fundamentals of Aquinas's usury analysis to be sound, it is not my intention to defend every conclusion he reaches. There is no question that his treatment of extrinsic interest titles is in some respects unduly rigorist. Some topics germane to the usury prohibition are not discussed by him at all. To a considerable extent, the later Scholastic tradition (on which, of course, he exerted an unparalleled influence) supplied the needed developments of his principles, and I accordingly draw freely on these developments, where appropriate. I lack both space and historical competence to examine every important *objection* that later Scholastics (to say nothing of non-Scholastics) made to his analysis. I confine my attention chiefly to the objections that Noonan deems particularly important.

In the first two sections, I seek to show that Noonan's reasons for maintaining that the Church has abandoned the prohibition are unconvincing. In the third and fourth sections, I defend Aquinas's natural-law argument for usury's sinfulness against the major objections raised by Noonan, and also against a radical objection urged by the contemporary Catholic libertarian scholar Thomas Woods. In the fifth section, I briefly consider the moral questions surrounding the *census* contract, which have an important, though indirect, bearing on the history of the usury prohibition. In the sixth section, I examine the questionable interest title of "risk," which Noonan and many others regard as a valid and important title, but which Aquinas nowhere discusses.

A view common among contemporary theologians and scholars is that, under modern capitalist conditions, extrinsic titles to interest on loans are nearly always present and, hence, the question of usury's intrinsic sinfulness is largely academic. Noonan himself seems to accept this view. I argue in the final section that Aquinas would certainly disagree, and with good reason.

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18 M. Cathleen Kaveny, "Development of Catholic Moral Doctrine: Probing the Subtext," *University of St. Thomas Law Journal* 1, no. 1 (2003): 234–52, at 238.

Noonan on the Status of the Usury Prohibition

In 1966, Noonan published a short comparative study of the history of Church teaching on usury and on contraception, in which he made the case that "the eternal gospel of Jesus Christ" does not categorically condemn either practice.[19] He took for granted that the Church had rescinded its usury prohibition. Present-day Catholics who believe that the medieval Church was "irrevocably committed" to the sinfulness of usury, he said, would have little choice but to conclude that "either the Church in 1450 or the Church in 1965 was in error."[20] Since no Catholic can accept that the Church has erred in a matter of morals, Noonan offered an explanation for the (alleged) change, consistent with faith in Church infallibility. He invited the reader to consider *why* the Church had once prohibited usury. The prohibition was intended, he argued, to foster "justice and charity," to protect "the poor from exploitation," to encourage "the avaricious to share their wealth," and to ensure "the proper distribution of capital for the life of the community." While it served these goals well in "the medieval village economy," it could not do so in a modern capitalist economy. The rise of capitalism consequently led to its abandonment, "without error by the Church."[21]

This explanation turns on the claim, to which Noonan seems to have held fast thereafter,[22] that the medieval Church did not regard usury as an intrinsically evil practice, but merely prohibited it in view of its (at that time inevitable) evil consequences. Noonan provides no evidence in support of this claim, and the historical record tells decisively against it. The authoritative, absolute condemnations of usury in the pre-modern period typically made no mention of the practice's actual or possible consequences. As Noonan's own study documents in exhaustive detail, nearly all of the medieval theologians and canonists who sought to justify

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19 John T. Noonan, "Authority, Usury and Contraception," *CrossCurrents* 16, no. 1 (1966): 55–79, at 75.

20 Noonan, "Authority, Usury and Contraception," 71. Noonan remarks that "traditionalist Catholics" are forced to reach this unwelcome conclusion by "a reading of the documents of the tradition as though the prohibitions stated were identical with dogmatic truths." The clear implication is that the usury prohibition was *not* a "dogmatic truth." Noonan thus tacitly disavows his own, earlier description of Church teaching on usury's sinfulness as a "dogma."

21 Noonan, "Authority, Usury and Contraception," 73.

22 In 1993, Noonan described the usury prohibition as "a moral doctrine dependent on economic conditions that could change," an apparent allusion to this claim ("Development in Moral Doctrine," *Theological Studies* 54 (1993): 662–77, at 663).

the prohibition urged the intrinsic wickedness of usury,[23] not the extrinsic expedience of its suppression.[24] Moreover, he tells us, both the early Scholastic analysis of usury and the "most strenuous" papal efforts to suppress the practice coincided with the emergence in Italy of proto-capitalist conditions, under which consequentialist objections would lose much of their force.[25] The last authoritative and unambiguous condemnation of usury, Benedict XIV's *Vix Pervenit*, appeared in 1745, when the basic institutions of modern capitalism were already well-established. Benedict is clear in this encyclical that usury is sinful, not because of its consequences, but because it violates "the law governing loans"—that is, "the equality of what is given and returned."[26] He stresses that it is sinful even when the borrower is rich and the money is "spent usefully, either to increase one's fortune, to purchase new estates, or to engage in business transactions."

If, as seems undeniable, the ordinary and universal magisterium once taught the intrinsic sinfulness of usury, the Church could *not* have abandoned this teaching "without error." In a 1993 paper on the general subject of development in doctrine, Noonan conceded that the teaching might not have been abandoned. "Formally," he wrote, "it can be argued that the old usury rule, narrowly construed, still stands: namely, that no profit on a loan may be taken *without a just title to that profit*."[27] However, he contin-

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23 Aquinas, for instance, describes usury as "unjust in itself" (*secundum se iniustum*) and as "evil simply" (*simpliciter malum*) in *ST* II-II, q. 78, a. 1, resp. and ad 2. (Quotations from *ST* are taken from the translation by the Dominican Fathers of the English Province; all Latin of Aquinas's work is from corpusthomisticum.org, and if translation is not otherwise attributed, it is my own done from the Latin there.) When Aquinas does consider usury's consequences, his purpose is not to buttress appeals to divine and natural law with a consequentialist justification of the prohibition, but rather to explain why, despite its intrinsic wickedness, human law permits usury on account of its *beneficial* consequences.

24 The outstanding exception, Noonan notes, was Pope Innocent IV, who condemned usury above all because of its "evil consequences" (*Scholastic Analysis*, 49). He admits that, in the thirteenth century, this consequentialist argument was "entirely new." He adds that it had no influence on later theologians, who "continued to maintain steadfastly that usury was *in se* and *secundum se* a sin" (51).

25 Noonan, *Scholastic Analysis*, 13. This is not to deny that the further and more radical development of capitalism in the sixteenth century largely explains the modifications in the later Scholastic treatment of usury (to be discussed below), which, Noonan argues, tended to undermine the prohibition.

26 Benedict XIV, *Vix Pervenit* (1745); English from papalencyclicals.net.

27 Noonan, "Development," 663 (emphasis mine). He does not say whether he accepts this argument. At the beginning of the paper (662) he declares flatly that the Church had "changed its teaching" on usury (and other subjects). In his response to this paper, Patrick O'Neil does not dispute this claim but rather goes

ued, "in terms of emphasis, of perspective, of practice, the old usury rule has disappeared: the just title to profit is assumed to exist."

A "just title to profit" is an interest title *extrinsic* to the act of lending. Beginning in the late Middle Ages, theologians came to agree on the justice of two basic extrinsic interest titles: "cessant profit" (*lucrum cessans*) and "emergent loss" (*damnum emergens*). A number of commentators plausibly argue that the former title is really only a special case of the latter.[28] In brief, if lending money deprives the lender of an opportunity for likely profit or in some other way causes him likely or certain financial loss, he is entitled to ask his debtor not only to repay the principal but to compensate him for this loss.[29] Noonan's 1993 claim, then, was that the usury prohibition has become a dead letter, since, under modern conditions, one can always assume the presence of some just extrinsic interest title.[30] He must have been aware that *Vix Pervenit* earnestly warns Catholics *not* to assume this.[31] Had economic conditions so altered since the encyclical's promulgation that an assumption unsafe in 1745 had become safe in 1993?

Noonan might argue that they had. He might even argue that the Church had long since recognized the fact. In *Scholastic Analysis*, he refers with apparent approval to "a standard commentary" on the 1917 Code

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even further than Noonan by speaking of the medieval Church's "error" about charging interest ("A Response to John T. Noonan Jr. concerning the Development of Catholic Moral Doctrine," *Faith and Reason* 22, no. 1–2 [1996]: 1–9, at 4).

28 Bernard Dempsey, *Interest and Usury* (London: Dennis Dobson, 1948), 171; Odd Langholm, *The Aristotelian Analysis of Usury* (Bergen: Universitetsforlaget, 1984), 50; Storck, *Economics*, 114.

29 It almost goes without saying that he might justly charge for administrative and other expenses incurred incidentally in lending. The Fifth Lateran Council, in session 10, expressly acknowledged this in its approving judgment on the *montes pietatis*, charitable lending institutions that charged only for expenses incidental to lending.

30 His formulation of "the old usury rule" ("no profit on a loan may be taken without a just title to that profit") implies that, according to this rule, "profit on a loan" *may* be taken when a "just title" is present. Since the teaching was (and is) that a just title to more than one's principal must be something extrinsic to the mere act of lending, it is at least potentially misleading to speak in this context of (just) profit "on" a loan. In fact, it is potentially misleading to speak of (just) "profit" at all. Profit is a net gain from commercial activity; the essence of the usury teaching is the sinfulness of seeking gain in lending. Compensation for loss is not the same as net gain (profit).

31 Benedict XIV warns that anyone who supposes that there is *always* a just title to interest on a loan "will oppose not only the judgment of the Catholic Church on usury, but also common human sense and natural reason" (*Vix Pervenit*, §5).

of Canon Law, according to which the code's canon on usury (no.1735) "states implicitly that in modern times there is always present in . . . a loan [of a fungible thing] some just reason for demanding the legal rate of interest."[32] But this interpretation of canon 1735 is questionable. The canon says that no profit may be made "on the ground of" a loan (the traditional teaching) and adds that it is "not itself illicit to contract for payment of the profit allocated by law, *unless it is clear that this is excessive*, or even for a higher profit, if a just and adequate title be present."[33] This clearly does not mean that there is *always* "some just reason" for demanding the legal rate of profit or interest, since it presupposes that the legal rate may sometimes be "excessive." Furthermore, "not itself illicit" need not mean "itself licit." A possible interpretation of the canon is that taking the legal rate of interest on a loan is neither intrinsically illicit ("itself illicit") nor intrinsically licit. Its liceity or illiceity rather depends on the presence or absence of some just (not merely positive) title to more than one's principal. (It may or may not be the case that, under modern economic conditions, such a title is commonly or even always present; the canon is silent on this point.) When present, a just title may still not allow one to demand as much as the law allows, and the legal rate is then "excessive." Since this interpretation strictly follows the letter of the canon and is clearly faithful to the traditional usury teaching, it is at least as plausible as the more liberal one that Noonan apparently favors. If it is correct, we cannot conclude that the Church of 1917 had formally dispensed with Benedict XIV's warning against presuming on the invariable presence of just titles to interest. Even if the more liberal interpretation were correct, and the Church of 1917 had declared this presumption safe, it had in the same breath declared *unsafe* the presumption that the legal rate of interest is never any higher than natural justice would permit. On either interpretation, it would certainly not be true that the usury prohibition, though technically still in force, had in the Church's own view lost all practical significance by 1917.

To be sure, the claim that some just title to interest on a loan is always, or nearly always, present in modern times had become a common opinion among moral theologians well before Noonan began publishing on the usury prohibition. In his *Handbook of Moral Theology* (first published in 1921), one of the most popular textbooks of moral theology in the decades before the Second Vatican Council, Father Dominic Prümmer declared

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32 T. Bouscaren and A. C. Ellis, *Canon Law* (Milwaukee, WI: Bruce, 1947), quoted in Noonan, *Scholastic Analysis*, 391.

33 *Codex iuris canonici* (Rome: Typis poliglottis Vaticanis, 1920), can.1735 (quoted in Noonan, *Scholastic Analysis*, 391, emphasis mine).

without hesitation that "under modern conditions there are nearly always some extrinsic titles . . . to justify the taking of reasonable interest for money lent."[34] Above all, it came to be widely accepted that, since the development of capitalism opens up practically limitless avenues for profitable investment, nearly *any* loan can be said to carry what is today known as an "opportunity cost." Hence, nearly any loan can be said to cause "loss" to the lender in the form of *lucrum cessans*, and he may therefore licitly charge what Prümmer calls "reasonable" interest (i.e., interest proportionate to this loss).[35] We shall see later that this line of reasoning, which also has eminent defenders today, is impossible to reconcile with Thomist principles.

The Alleged Change in Church Teaching

Noonan's considered view for most of his later career was that the twentieth-century Church had not merely "fallen silent" about the usury prohibition, nor even merely accepted the prohibition's alleged practical insignificance under modern economic conditions, but had actually abandoned it. When precisely did he think it had done so? He did not address this question in his 1966 study of usury and contraception, and he would answer it in different ways in different subsequent publications. We should firstly consider his 1969 paper "Usury: The Amendment of Papal Teaching by Theologians."[36]

This paper describes the responses of theologians (and the laity) to three sixteenth-century papal bulls reaffirming the usury prohibition in the face of novel "theories and practices" that threatened to remove "the prohibition's rigor from the world of commercial credit."[37] The "practices" in question were certain commercial contracts arguably indistinguishable in substance from loans at usury. The bulls condemned these contracts

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34 Dominic Prümmer, *Handbook of Moral Theology*, 5th ed., trans. Gerald W. Shelton (Cork, Ireland: Mercier, 1956), 340.

35 It is not clear how early twentieth-century theologians like Prümmer could reconcile a belief in the invariable presence of just titles to interest with the (admittedly somewhat obscure) allusion by Pope Leo XIII in *Rerum Novarum* (1891) to "rapacious usury, which, although more than once condemned by the Church, is nevertheless, under a different guise, but with like injustice, still practiced by covetous and grasping men" (§3; English trans. from the Vatican website).

36 John T. Noonan Jr., "Usury: The Amendment of Papal Teaching by Theologians," in *Change in Official Catholic Moral Teachings*, ed. Charles Curran (New York: Paulist Press, 2003), 80–108. The paper was originally published in *Contraception: Authority and Dissent*, ed. Charles Curran (New York: Herder & Herder, 1969), 41–75.

37 Noonan, "Usury," 91.

in the severest terms. (Noonan describes them as "authentic acts of papal teaching authority," though he stops short of claiming that the popes were speaking *ex cathedra*.) Nonetheless, with some important exceptions, contemporary theologians disregarded the bulls and defended the contracts. "In practice," Noonan says, "by 1589 the theological analysis had replaced the papal one."[38] This "theological analysis" rested on principles whose implications "undercut the usury rule."[39] In short:

> If the question is asked, How and when did the usury prohibition change? the answer is, It changed in the sixteenth century, and it was changed by the theologians, over stubborn papal resistance, defending forms of behavior in which profit was sought in extending credit.[40]

It is worth stressing that Noonan is not here merely describing the genesis of a novel theological opinion. He is claiming to identify the point at which a *Church teaching* was revised. Why is he so confident that the usury prohibition "changed" (i.e., was abandoned) in the sixteenth century? Let us suppose he is correct in claiming that a majority of theologians near the end of the sixteenth century endorsed a "theological analysis" that undermined the usury prohibition.[41] (We shall see shortly that, on Noonan's own showing, there is good reason to doubt that this alleged near consensus was lasting.) The emergence over less than twenty years of an imperfect consensus of theologians, in flagrant disregard of the solemn teaching of two contemporaneous popes and in implicit opposition to more than a thousand years of Church tradition, is surely not decisive.

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38 Noonan, "Usury," 103.

39 Noonan, "Usury," 104.

40 The facts of this sixteenth-century controversy are treated at greater length in Noonan's original 1957 study (*Scholastic Analysis*, chapters 10, 11, 13, and 16). Noonan's concern in this book, as he says in the introduction, was the "history of thought" (5), not the development of Church teaching. This is presumably why he was content in 1957 to relate the acts and statements of popes and theologians, without saying much about their magisterial weight.

41 In his brief history of the usury prohibition in the first half of *Interest: An Historical and Analytical Study In Economics and Modern Ethics* (Milwaukee, WI.: Marquette University Press, 1959), Thomas F. Divine attaches no special importance to late sixteenth-century theological discussion, and he claims that there was "almost unanimous agreement among Catholic moralists and legists in accepting the fundamental principles of the Scholastic doctrine of usury" until the end of the seventeenth (80), though this may be an exaggeration (see below).

Noonan would perhaps argue that the new "theological analysis"[42] was not seriously challenged thereafter and that, more than four hundred years later, we can retrospectively see it as a turning point not just in theological discussion but in Church teaching. He claims, without providing evidence, that "the popes . . . formally reconcile[d] themselves to the theologians" in the eighteenth century.[43] He must here be alluding to *Vix Pervenit*, since no other eighteenth-century papal document thematically addressed the subject of usury. Yet this encyclical was robustly traditional. As noted above, it forcefully restated the classic usury prohibition. To be sure, it also acknowledged the "controversies" among theologians and canonists over the possible usuriousness of certain (unspecified) contracts.[44] About these contracts, said Benedict, "we . . . shall not decide now." In *Scholastic Analysis*, Noonan remarks that, by this "explicit reservation," "the field of discussion" was left "virtually unchanged."[45] It is indeed striking that Benedict did not confirm the condemnations of his sixteenth-century predecessors. Nonetheless, he did not *endorse* the novel position of the sixteenth-century theologians who disregarded these condemnations. Far from "formally reconciling" himself to a theological analysis inimical to the usury prohibition, he merely declared that he would not (at that time) determine whether certain contracts did or did not fall under the prohibition. Furthermore, as Noonan's reference to "the field of discussion" indicates, even in the mid-eighteenth century there was no theological *consensus* about the modern commercial practices that the sixteenth-century popes had condemned as usurious. The contracts on which Benedict refrained from passing judgment were precisely those about which, he said, "the theologians and canonists *lack agreement*." His encyclical was prompted in part by what both Noonan and Patrick Cleary describe as an early eighteenth-century "reaction" against the liberal tendencies characteristic of the late sixteenth and seventeenth centuries.[46] This reaction seems to have been effective, since, according to Noonan himself, most

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42 The expression "theological analysis" suggests a coherent and comprehensive theory, but it is clear from Noonan's account that no such theory was developed by the opponents of the three papal bulls. Their responses were, in the main, a mixture of pleas for exceptions to the bulls' condemnations and more or less *ad hoc* rationalizations for simply disregarding the bulls.

43 Noonan, "Usury," 103.

44 Benedict XIV, *Vix Pervenit*, §6.

45 Noonan, *Scholastic Analysis*, 357.

46 Noonan, *Scholastic Analysis*, 225; Cleary, *Church and Usury*, 158. This reaction was spearheaded by the rigorist Pietro Ballerini. His chief liberal opponent was Scipio Maffei, a personal friend of Benedict XIV.

theologians were in favor of "the old theory" (i.e., the pre-sixteenth-century theory) in the early nineteenth century.[47]

Noonan claims that the liberalizing sixteenth-century theologians defended the papally condemned commercial contracts by exploiting hidden inconsistencies in "the old theory."[48] The kernel of "the old theory" is the mature usury analysis of Aquinas. The sixteenth-century theologians accepted the principles of this analysis but, according to Noonan, showed that the implications of Aquinas's principles "undercut the usury rule." I will consider this claim later, when examining Noonan's critique of Aquinas's natural-law case against usury. My present concern is only with Noonan's claim that the Church has at some time or another changed its teaching about usury. His 1969 thesis that it had abandoned the usury prohibition in the late sixteenth century is, we have now seen, untenable.

Later in his career, Noonan argued that it was not in the sixteenth or eighteenth century, but only in the nineteenth, that the Church abandoned the prohibition. Owing in part to the very uncertainty noted (and not removed) by Benedict XIV in *Vix Pervenit*, between 1822 and 1837 a number of perplexed bishops and other local Church authorities formally sought guidance from Rome. Most of their inquiries were about how to deal with penitents who had, in good faith, made money in ways that were arguably usurious, though defended by some theologians. Responses were given by Pope Pius VIII, the Holy Office, and the Sacred Penitentiary.[49] Again and again, inquirers were told that penitents and liberal-minded confessors and preachers whose good faith was not in question were "not to be disturbed," provided they were prepared to abide by any future decision of the Holy See. This, Noonan intimates in a paper delivered in 1999, left little room for further doubt: "The prohibition, as it had been framed in the twelfth century, was dead."[50] This seems a gross overstatement. To

47 Noonan says that, in the first three or four decades of the nineteenth century, "since all the weight of traditional authority was on its side, it still was generally accepted" (*Scholastic Analysis*, 382). Confusingly, however, he has earlier said that, at this same period, "many, even among the scholastic authors themselves, [were] inclined to abandon the traditional theory for the new one" (377). Recall his claim in "Usury" that, by the end of the sixteenth century, the "old theory" had been effectively abandoned. Apparently, this abandonment was only temporary.

48 Noonan, "Usury," 104.

49 The responses are reproduced in Jacques-Paul Migne, *Theologiae Cursus Completus* (Paris, 1841), 16:1065–83. When I quote below from the original Latin of the responses, I rely on Migne.

50 John T. Noonan Jr., "Experience and the Development of Moral Doctrine," *Catholic Theological Society of America Proceedings* 54 (1999): 43–56, at 49. He makes a very similar statement ("The old usury prohibition was dead") in "Usury," as noted

begin with, the constantly reiterated qualification ("provided they are prepared to . . .") indicates the provisional nature of these responses.[51] The Roman authorities pointedly refrained from issuing any *doctrinal* clarification. As Cleary remarks, "it was made clear over and over that no definition of any description was being given."[52] Rather, "the practical point was decided, judgment concerning principles being deferred." Thomas Divine concurs, saying that the responses "left the solution of the theoretical problem an open question."[53] On the other hand, the Holy Office in 1835 extended *Vix Pervenit* to the universal Church, thereby forcefully emphasizing the continuing validity of the traditional usury teaching. In his last published book, Noonan speaks more cautiously (if less coherently) of "the *partial* withdrawal of the teaching [that usury is intrinsically evil] that occurred in the nineteenth century."[54] But the studied avoidance of doctrinal questions in the Roman decrees of the 1820s and 1830s, coupled with the 1835 reaffirmation of the teaching of *Vix Pervenit*, hardly amounts to a "withdrawal" (partial or otherwise) of the usury prohibition.

In *Scholastic Analysis*, Noonan says that the "correct interpretation" of these decrees is not "easily determined."[55] One doubtful interest title that assumed increasing importance in the course of the inquiries to Rome was "the law of the prince" authorizing modest interest on loans, also called the "civil" or "legal" title. Noonan professes to find it difficult to interpret the significance of the Roman authorities' responses to inquiries about this title. It was decreed that neither penitents who had made a profit on the strength of the legal title alone nor priests and theologians who taught the validity of this title were to be denied sacramental absolution, provided they were prepared to abide by any future decision of the Holy See. Does it follow, Noonan asks here, that the authorities meant "definitively to approve" the legal title? He claims that at least one contemporary

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earlier. This inconsistency in dating the "death" of the usury prohibition might suggest that Noonan himself came to recognize the rashness of his 1969 thesis.

51 Noonan disregards this qualification in "Experience."

52 Cleary, *Church and Usury*, 175.

53 Divine, *Interest*, 110.

54 John T. Noonan Jr., *A Church That Can and Cannot Change: The Development of Catholic Moral Teaching* (Notre Dame, IN: Notre Dame University Press, 2005), 135 (emphasis mine). He does not here refer specifically to the responses of 1822–1838, but his later remarks about these responses (141) leaves little room for doubt that he has them in mind. After discussing them briefly, he immediately declares, once again: "The usury prohibition in its old form was dead." His reversion to this blunt formula is perhaps unsurprising, since the notion of a "partial withdrawal" of a teaching makes little sense.

55 Noonan, *Scholastic Analysis*, 381.

churchman (the bishop of Bellay) answered this question in the affirmative. Yet the excerpt he here quotes from the bishop's 1838 pastoral letter to his clergy shows the very opposite. The bishop interpreted the decrees as authorizing him to conclude that belief in the validity of the legal title to interest was, in Noonan's translation, "an opinion, which with a safe conscience, can be held and followed in practice, like many others *not defined* by the Church." The expression I have italicized—"not defined"—makes nonsense of the claim that the bishop believed that the Church authorities meant "definitively" to approve the opinion in question. He said no more than that a Catholic might "with a safe conscience" hold this opinion, despite its *not* having been definitively approved. The precise meaning of the Latin original—*nondum definitas*—is "not *yet* defined." It is reasonable to interpret this as an allusion to the repeated warnings that all Catholics must be prepared to abide by any future decision of the Holy See (a decision that might, of course, be against the legal title). The bishop of Bellay believed it safe to hold the opinion that the legal title is valid only as long as the Holy See had not decided against it and only on condition that one be prepared to abide by a possible future decision against it.

It is strange that Noonan should even pose the question of whether the Roman authorities meant "definitively to approve" the legal title, less than half a page after quoting a passage from the second-last decree that begins: "The Sacred Penitentiary *wished to define nothing at all* about the question, debated by theologians, of the title derived from the law of the prince."[56] The concluding sentence of this quoted passage also seems to leave no possible doubt that Noonan's question must be answered in the negative: "Those, therefore, who in preaching teach *absolutely* that it is licit to take profit from a loan by the title of the civil law . . . define by private authority a question which the Holy See did not yet wish to define."[57]

Why, then, does Noonan suppose that there is any ambiguity in the decrees regarding the legal title to interest? His discussion of the eleventh decree suggests an answer. This decree, issued in 1831, was in response to questions from the bishop of Viviers. According to Noonan, the bishop sought to know, firstly, "if the past decisions authorized interest on loans to businessmen, apart from the title conferred by the civil law" and, secondly, "if the very existence of civil law regulating interest, *ipso facto*, without the State's explicit intention of exercising its prescriptive power, created a just

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56 Noonan, *Scholastic Analysis*, 380 (emphasis mine).

57 Noonan, *Scholastic Analysis*, 380–81 (emphasis mine). In a subordinate clause that Noonan has omitted, the decree describes such preachers as "rashly usurping the part of judge" (*partes judicis sibi temere assumentes*).

title to interest."[58] The Holy Office responded by referring the bishop to earlier replies, "thus implicitly indicating an affirmative answer to both questions." In other words, the Holy Office implicitly approved interest on loans to businessmen under certain conditions and, more importantly, implicitly *endorsed the legal title*.

As we have seen, the Roman authorities generally restricted their responses of the 1820s and 1830s to practical directives and expressly reserved to the Holy See the clarification of doctrinal questions. On Noonan's presentation, the eleventh decree is an anomaly. Moreover, it seems to mark a startling departure from the rigor of preceding centuries. Positive law alone cannot render a naturally unjust contract just. No theologian offered a serious defense of the legal title to interest until the eighteenth century, and the title found very little support in Rome in the decades after the appearance of *Vix Pervenit*.[59] Cleary quotes the 1793 reply of the Sacred Congregation of Propaganda to a query from the bishop of Quebec regarding the legal title to interest, which opened with the flat declaration that "usury is forbidden both by the natural and divine law, whence it follows that it cannot be rendered lawful by any civil authority or legislation—and this no matter how small the usury may be."[60]

Noonan's presentation of the eleventh decree is, in fact, seriously misleading. The bishop of Viviers had sought clarification of previous decrees whose sole concern was the conduct of confessors. The bishop noted that Pius VIII had issued a decree on August 18, 1830, in which there was no reference to the civil law interest title, but that appended to this decree were responses to queries relating to this title. Pius VIII's decree stated that confessors were "not to be disturbed" if they did not deny absolution to businessmen who had in good faith made profits on loans and had promised to abide by any future decision of the Holy See. The bishop's first question, therefore, was whether this decree "must be understood as its words sound, and aside from the title of the law of the prince, about which the Most Eminent Cardinals speak in these responses, so that it is just a matter of a loan made to business men."[61] What is at issue here is not, as Noonan claims, the authorization of interest on business loans, but merely the practice of confessors when dealing with businessmen who had (in good faith) charged interest on loans. The bishop's second question was

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58 Noonan, *Scholastic Analysis*, 379.

59 Cleary, *Church and Usury*, 165–66.

60 Cleary, *Church and Usury*, 167.

61 This is the translation in Heinrich Denzinger, *The Sources of Catholic Dogma*, trans. Roy J. Deferrari (Fitzwilliam, NH: Loreto Publications, 2002), no. 1611.

whether "the title from the law of the prince, about which the Eminent Cardinals speak, must be so understood [*sic intelligendus sit*] that it is enough that the law of the prince declares that it is licit for anyone to agree about a gain made from a loan only, as happens in the civil code of the Franks, without saying that it (the law of the prince) grants the right to receive such gain." The bishop was not asking whether, in Noonan's words, the "very existence of civil law regulating interest" creates "a just title to interest." He merely wished to know how the expression "title from the law of the prince" (*titulus ex lege principis*), as it occurred in previous responses, was to be correctly understood.

As Noonan says, the Holy Office (rather unhelpfully, it would seem) responded to the bishop's questions by simply referring him to earlier replies—specifically, the replies of August 18, 1830. Since these replies did no more than provisionally authorize a liberal approach to penitents, the eleventh decree does not carry the doctrinal significance that Noonan ascribes to it. Like the other decrees in the series, it avoids doctrinal questions entirely.[62]

Late in his career, Noonan nonetheless interpreted these decrees as a (partial) "withdrawal" of the usury prohibition. This interpretation derives such plausibility as it has from the Roman authorities' provisional toleration of the legal title to interest. We have seen that, despite Noonan's claims to the contrary, the bishop of Bellay did not interpret the decrees as "definitively" approving the legal title, still less as withdrawing the usury prohibition. Is there any reason to think that a majority of contemporary churchmen interpreted them as did the later Noonan? According to the Noonan of 1957, most theologians who addressed the topic of usury in the nineteenth and early twentieth centuries "showed little enthusiasm" for the legal title.[63] Regarding the status of the usury prohibition, Cleary notes that, in the preparations for the First Vatican Council of 1870, there were "three petitions for a definite statement on the question of usury, or failing this, for a definition on the value of the title of the civil law."[64] One of these petitions was signed by twenty American bishops. This seems clear evidence that the earlier decrees were (correctly) taken by most churchmen not to have settled anything. At the same time, it underscores the

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62 Noonan concludes his discussion of the responses by saying that "the Holy Office cannot be said positively to favor the civil . . . title" (*Scholastic Analysis*, 382). Though hardly consistent with his own interpretation of the eleventh decree, this conclusion is accurate.

63 Noonan, *Scholastic Analysis*, 388.

64 Cleary, *Church and Usury*, 176.

uncertainty about the prohibition and its practical ramifications that had become widespread among theologians by the latter half of the nineteenth century.

There is, in fact, *prima facie* evidence in support of Noonan's claim that the nineteenth -century Church came to endorse the legal title to interest in an 1873 instruction of the Sacred Congregation of Propaganda, which Noonan himself, curiously, does not mention. The Congregation declared that, "even in the absence of other titles such as *lucrum cessans*, etc., . . . the mere title of the civil law may be taken as being in practice quite sufficient . . . so long as the question remains undefined by the Holy See."[65] This certainly seems to contrast sharply with its trenchant warning to the bishop of Quebec eighty years earlier that usury "cannot be rendered lawful by any civil authority or legislation." Yet we should not exaggerate the instruction's significance. To begin with, the Congregation recognized that the question about the legal title to interest "remains undefined by the Holy See." Furthermore, the words "in practice" suggest that it was not primarily concerned with the *theoretical* or doctrinal basis for (provisionally) permitting Catholics to take the legal rate of interest on loans. In any case, even if we suppose that the Congregation did intend provisionally to endorse the legal title, we must recall that the 1917 Code of Canon Law (which is presumably more authoritative than the 1873 instruction[66]) expressly recognizes that the legal rate of interest may be "excessive." As Noonan remarks, this implies that "the law by itself does not create a right to interest." In other words, the 1917 Code of Canon Law implicitly *rejects* the legal title.

Noonan does not make a persuasive case that the Church has at any time abandoned the usury prohibition. We must now turn to Aquinas's natural-law defense of the prohibition, and Noonan's critique thereof.

Aquinas's Major Argument

A capitulary issued during the reign of Charlemagne states that usury occurs "where more is asked than is given."[67] This succinct definition brings into clear relief the medieval view of the transaction's moral character. To

65 Noonan, *Scholastic Analysis*, 175. Cleary rightly draws attention to the fact that this instruction, unlike the responses of the 1820s and 1830s, makes no mention of any good faith requirement (*Church and Usury*, 176).

66 Noonan notes that at least one contemporary theologian regarded the canon as "the long-awaited answer of the Holy See to the nineteenth-century inquiries about the *lex principis*" (*Scholastic Analysis*, 391).

67 Noonan, *Scholastic Analysis*, 15. Noonan calls this "the first medieval definition of usury."

demand more in exchange for less is inequitable and hence unjust; this, in brief, is the natural-law objection to usury.

It is difficult to dispute the injustice of demanding more in exchange for less. Indeed, the only way in which to do so, without abandoning the very idea of (natural) justice in contracts, is to claim that whatever contractual terms two adults of sound mind freely agree upon are *ipso facto* "just."[68] If one does not take this radical approach to justice in contracts, the most natural way in which to defend usury is to argue that the capitulary's definition mischaracterizes the transaction. A lender who demands something above his principal (it may be said) does not in fact "ask more than he gives." The addition to the principal is rather payment for some good or service, or else compensation for some loss. As noted earlier, the Scholastics did not deny that a lender might justly demand compensation for expenses or losses incurred through lending.[69] However, they held that any just title to something above one's principal must be extrinsic to the act of lending itself. To admit the existence of a just title intrinsic to the act of lending would be to destroy the usury prohibition. The apologist for usury would insist that there exists at least one just title to something above one's principal that *is* intrinsic to the act of lending. One obvious candidate title is the use of the money lent during the loan period, which the lender forgoes so that the borrower may enjoy it. The very word "usury" originally meant "payment for the use of money."

When presenting his major argument[70] for the sinfulness of usury, Aquinas anticipates the apologist's likely characterization of usury as (just) "payment for the use of money." Aquinas seeks to show that it is unjust to charge for the use of money. His argument is premised on a distinction between different kinds of goods. Some goods, he says, are necessarily "consumed" or "destroyed" when used.[71] Wheat is "consumed"

68 Thomas Hobbes was one of the first philosophers to articulate this view. In *Leviathan*, 15:14, he declares: "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give." In the same context he speaks contemptuously of the notion that it is unjust "to sell dearer than we buy" or "to give more to a man than he merits" (ed. by J. C. A. Gaskin, Oxford World Classics [1998], 100)

69 Aquinas's position is apparently more restrictive than that of his successors. I discuss this topic in the final section.

70 "Major argument" is one of Noonan's descriptions of what is certainly Aquinas's most famous and influential natural-law argument for the intrinsic sinfulness of usury, presented not only in *ST*, but also in *De malo* and elsewhere. I touch on one of his other, earlier anti-usury arguments below.

71 Aquinas, *ST*, II-II, q. 78, a. 1, resp.

when eaten, and wine is "consumed" when drunk. The use of such goods "consists in their consumption." More precisely, their primary or proper use consists in their consumption. (They can of course be used in other ways too, some of which do not involve their consumption or destruction. The ancient Romans, for instance, threw wheat [symbolizing fertility] at newly married couples. In his discussion of usury in *De malo*, q. 13, a. 4, Aquinas speaks of the "proper use" [*proprius usus*] of wine and wheat [a. 4, resp.] and, more generally, of the "proper and primary use" [*proprius et principalis usus*] of goods [a. 3, ad 15].[72] In the *Summa theologiae* [*ST*] II-II, q. 78, a. 1, resp., he similarly speaks of the "proper and primary use of money.") It follows that to grant someone the (primary or proper) use of wine or wheat is "to grant the thing itself." Consequently, "to lend things of this kind is to transfer the ownership."

Other goods are not consumed or destroyed when put to their primary or proper uses. To use a house, Aquinas says, is "to dwell in it, not to destroy it."[73] A man may grant someone else the use of his house for a time, while not transferring the ownership. Use and ownership of goods like houses are separable in a way that use and ownership of goods like wheat and wine are not.

When use and ownership are in this way separable, it is permissible to charge for the use of what remains one's own. Renting a house is an obvious example. However, it is not *possible* to charge for the use alone of a good whose use consists in its consumption. A winemaker who charges for the (primary or proper) "use" of his wine is simply charging for the wine itself. He is selling the wine. If he wanted "to sell wine separately from the use of the wine," Aquinas observes, "he would be selling the same thing twice, or he would be selling what does not exist." In so doing, "he would evidently commit a sin of injustice." Likewise, Aquinas continues, "he commits an injustice who lends wine or wheat, and asks for double recompense, viz., one, the return of the thing in equal measure, the other, the price of the use, which is called usury."[74]

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72 When quoting from *De malo*, I use the translation by Richard Regan (New York: Oxford University Press, 2003).

73 All goods admittedly deteriorate over time with use. Aquinas would presumably not object to a landlord demanding that his tenant of twenty years pay for at least some of the maintenance and repairs that such prolonged occupancy would make necessary. Nonetheless, wear and tear is incidental to the use of a house in a way that consumption or destruction is certainly not incidental to the (primary or proper) use of wine or wheat.

74 Since Aquinas is here speaking of selling the use of wheat or wine, he would seemingly regard it as usurious to charge for the use of *any* loaned good consumptible in

Money, like wheat and wine, is a good whose primary or proper use consists in its consumption.[75] The "consumption" of money does not, of course, mean its destruction, as with wheat or wine; it rather means its alienation in exchange, as a result of which the user loses both use and ownership of the money he has spent. The usurer, according to Aquinas, commits the same sin of injustice as the imaginary winemaker. To take usury for money is either "to sell the same thing twice," or "to sell what does not exist."

In Noonan's view, Aquinas does not consistently maintain the thesis that money's use and ownership are inseparable. The basis for this claim is Aquinas's brief discussion of the investment partnership or *societas* in his response to the objection that, since it is "lawful to receive interest for money entrusted to a merchant or craftsman," it is also "lawful to receive interest for money lent" (*ST* II, q. 78, a. 2, obj. 5). Aquinas says that, whereas a moneylender "transfers the ownership of the money to the borrower," "he that entrusts his money to a merchant or craftsman so as to form a kind of society [*societas*], does not transfer the ownership of his money to them, for it remains his" (a. 3, ad 5). It is thus at the investor's risk that the merchant speculates with his money or the craftsman "uses it for his craft." (In the thirteenth century, property insurance did not yet exist.[76]) Therefore, the investor "may lawfully demand as something belonging to him, part of the profits derived from his money." Since the investor is said to retain ownership of the money that the merchant or craftsman uses, Noonan does not hesitate to accuse Aquinas of "abandon[ing] his own principle that the use

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use. On the other hand, he shortly thereafter defines "usury" narrowly as "payment for the use of money lent." Similarly, in *De malo*, q. 13, a. 4, resp., which treats expressly of usury, he speaks only of "lending money at interest" (*dare pecuniam mutuo ad usuram*). Usury on money loans is, of course, by far the most important example of payment for the use of loaned consumptibles. Anscombe notes that the condemnation of usury in Deut 23:19 explicitly mentions a consumptible (grain) other than money ("Philosophers and Economists," 248). According to Noonan, Aquinas's contemporaries normally spoke of usury in loans of all things "in number, weight and measure" (*Scholastic Analysis*, 57). Aquinas was "more careful . . . in distinguishing the limits of the natural law" by holding that usury is only possible in loans of consumptibles.

75 In his reply to obj. 6, Aquinas notes that there are sometimes other uses for money, such as the display of coins. To charge for renting coins for display, which the Romans called renting *ad pompam*, is not usurious.

76 The earliest known European insurance contracts date from 1343 (David Rowell and Luke B. Connelly, "A History of the Term 'Moral Hazard,'" *The Journal of Risk and Insurance* 79, no. 4 [2012]: 1051–75, at 1054).

and the ownership of money are indistinguishable."[77] (This is why he says that "the promptings of natural justice" are stronger than the "theory" that Aquinas develops in order to rationalize the usury prohibition.)

On the basis of Aquinas's statement that it is at the investor's risk that the merchant speculates with his money or the craftsman uses it for his craft, Noonan claims that he here introduces a "new principle": namely that "ownership . . . is determined by incidence of risk."[78] The principle that use of a consumptible good is inseparable from ownership thereof entails that use is in this case a *criterion* of ownership. Having allegedly abandoned this principle, Aquinas is driven (Noonan argues) to posit a different criterion of ownership—one by which an investor in a partnership, unlike a moneylender, retains ownership of his money. Incidence of risk serves this purpose, even though, as Noonan says, nothing in Aquinas's "formal treatment of ownership" justifies its adoption as a criterion of ownership. Aquinas has "produced the risk criterion *ad hoc* to distinguish loans from capitalistic partnership." It seems to me that this "new principle" is a figment of Noonan's imagination. For reasons to be explained shortly, I think he is mistaken to claim that Aquinas abandons the principle of the inseparability of use and ownership of consumptibles, but even apart from this, his argument rests on a strained reading of the text. Aquinas does not say or imply that ownership is necessarily "determined by incidence of risk," and he certainly does not formally propose risk as a criterion of ownership. He simply observes that, because the investor retains ownership of his money, the merchant or craftsman uses the money at the investor's risk. In a world without insurance contracts, this observation is correct.[79]

Aquinas's alleged inconsistency regarding the principle that use and ownership of consumptibles are inseparable is related, Noonan argues, to a further inconsistency regarding the very nature of money. In his analysis of usury, Aquinas (allegedly) treats money as naturally "sterile" or unproductive, whereas in his brief discussion of the *societas*, he treats it as a source

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77 Noonan, *Scholastic Analysis*, 143.

78 Noonan, *Scholastic Analysis*, 143.

79 Noonan does not seem to distinguish clearly between the proposition that risk is a *criterion* of ownership and the proposition that ownership is "determined by incidence of risk." The first means that risk is a sufficient condition of ownership, which seems unconditionally true. The second means that risk is a necessary *and* sufficient condition of ownership, which would cease to be true with the advent of insurance. I see no reason for ascribing the second view to Aquinas, though Noonan provides clear evidence that some later thinkers did indeed treat risk as a sufficient and necessary condition of ownership (see, e.g., *Scholastic Analysis*, 203).

of gain to the investor, hence as a productive good.[80] This inconsistency, Noonan adds, "will characterize nearly every scholastic attempt to legitimate the *societas* while denying the right of money to bring in a return on a loan."

Aquinas's thesis that use and ownership of money are, to use Noonan's word, "indistinguishable" needs to be rightly understood. Taken in one way, it is obviously false, and for reasons unrelated to Aquinas's treatment of the *societas*. When a child buys a bottle of milk on his mother's orders, with money she has given him, his use of this money does not mean that he owns it. The natural thing to say is that he is spending his mother's money. The reason, I suggest, is that he is carrying out her wishes, not his own. In a sense, she *is* spending the money; the child is, as it were, her instrument. We may then say that use and ownership are indeed "indistinguishable" in this case. In a partly similar way, when a stockbroker invests clients' money at their behest, there is a clear sense in which the money's owners—the clients—are the investors. Unlike the child buying milk for his mother, the stockbroker is often required to make his own decisions about how to use clients' money. But ultimately, he is still only their instrument, however much discretion he has to carry out their wishes in this way or that. The case of the *societas* is different because, as Noonan himself notes,[81] the partners in a *societas* are *joint* owners of its assets. When Aquinas says that a man who invests in a *societas* "does not transfer the ownership of his money to [the merchant or craftsman], for it remains his," he presumably does not mean that the investor retains *sole* ownership of the invested money.[82] He rather means that the investor does not *relinquish* ownership, but rather extends it to his partner, on the understanding that the partner will use the money (of which he is now a joint owner) with a view to making a profit.[83] If this is correct, then it would follow that the use and ownership of this money are "indistinguishable" in two ways. Firstly, the merchant or craftsman *is* the (joint) owner of the money he uses. Secondly, in using this money he is in one aspect the instrument of the money's other joint owner, who may therefore be said to be its (joint) user.

As for Noonan's claim that Aquinas's analysis of usury presupposes

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80 Noonan, *Scholastic Analysis*, 145.

81 Noonan, *Scholastic Analysis*, 134.

82 If this *is* what he means, then the arrangement he is describing would not be a genuine *societas*, but rather something comparable to the employment of a stockbroker.

83 This is also John Finnis's interpretation (*Aquinas: Moral, Political and Legal Theory* [Oxford: Oxford University Press, 1998], 205n114).

money's "sterility," while his treatment of the *societas* presupposes its "fertility," we must firstly note that, in his treatment of usury, Aquinas at no point says that money is naturally "sterile" or "unproductive." In a different context, he includes money under the heading "things that bear no fruit" (*rebus quae non fructificant*).[84] This seems to mean no more than that, since the "primary or proper use" of money is its alienation in exchange, money is not *immediately* fruitful in the way that seeds or fields are. This is an unexceptionable statement of fact. Aquinas is well aware that money can nonetheless be an *indirect* source of perfectly licit profit.[85] The thesis of money's "sterility" allegedly underpinning his analysis of usury, on the other hand, is supposed to entail that money *cannot* be even an indirect source of licit profit.

Noonan apparently attributes to Aquinas the view that usury is objectionable on account of the "sterility" of money because, when responding to an objection in question 78 of *ST* II-II, he cites with approval Aristotle's statement that "to make money by usury is exceedingly unnatural."[86] The brief discussion of usury in the *Politics*, in the context of which this statement occurs, is at least one source for the medieval view that it is unnatural for money, a "sterile" good, to "breed" its like. However, Aristotle himself does not make precisely this claim, the meaning of which is in any case not obvious. What Aquinas *takes* Aristotle to mean when he says that usury is "exceedingly unnatural" is also not obvious, since Aquinas merely quotes this statement, approvingly but without comment.[87] Aristotle's actual objection to usury seems to be contained in his statement that usury is "most reasonably hated" because the usurer's gains "derive from money itself and not from that for which it was supplied."[88] Money "came into being for the sake of exchange," but the usurer does not exchange it for other goods and thereby increase his wealth; he rather increases his wealth by exchanging less money for more. Aristotle concludes that this kind of money-making is "exceedingly unnatural."[89] Whatever we make of

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84 Aquinas, *ST*, II-II, q. 61, a. 3, resp.

85 See below.

86 *Scholastic Analysis*, 53.

87 See note 89, below.

88 Aristotle, *Politics* 1.10.1258b1–4. I am using the translation by Carnes Lord (Chicago: University of Chicago Press, 1984).

89 Or, in Lord's translation, "most contrary to nature." In his Commentary on the *Politics*, Aquinas says with reference to this passage that usury is "the most contrary to nature, since it is according to nature that money is acquired from natural things, not from money" (*In* I *pol.*, lec. 8; transl. Richard J. Regan [Indianapolis, IN: Hackett, 2007]). He does *not* say that usury is contrary to nature because it is

this argument,[90] it is clear that neither the investor nor the non-investing partner in a *societas* seeks to become wealthier by exchanging less money for more. The non-investing partner spends the investor's money (which is now also his) in business transactions that he hopes will prove profitable to them both. His profit, if any, certainly does not derive "from money itself," but (indirectly) from "that for which it was supplied." If there is a clearly stateable Aristotelian objection to money "breeding" its like, this objection has no application to the *societas*. There are no grounds for charging Aquinas with holding two inconsistent theories of the nature of money (whatever may be true of the later Scholastics).

I have noted that property insurance did not exist in Aquinas's day. There is no obvious reason to suppose that he would have objected to it, and after its invention in the fourteenth century, no Scholastic theologian did object to it. However, the eventual use of insurance by investors in *societates* would necessitate a development of the Thomist usury analysis.

An investor in a *societas* may, of course, have his principal insured. He may also request his partner in the *societas* (the merchant or craftsman) to act as his insurer. Finally, he may contract to forgo part of his share in the anticipated profit from the *societas* in return for the partner's insuring *both* his principal *and* the remainder of his share in the anticipated profit. In this last case, the partners would enter into a contract with three components: the partnership itself, the insurance of the investor's principal, and the insurance of a part of the investor's share in the anticipated profit.[91] This

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not in the nature of money to "breed." His point seems to be that the "natural" way in which to make money is by selling goods other than money ("natural things"). The precise reason for this is not, indeed, spelled out. Anscombe suggests that Aquinas's own natural-law argument against usury should be interpreted as an elaboration of what is only implicit in Aristotle's argument ("Philosophers and Economists," 248), a suggestion whose merits I cannot discuss here.

90 Langholm is, I think, correct when he says—in agreement with "most scholars," he claims—that Aristotle's point is *not* that usury is "an unnatural use of money because money *cannot* breed," but rather that "money *should not* be made to breed . . . because usury is an unnatural use of money" (*Aristotelian Analysis*, 62). Langholm adds here that Aristotle "in fact recognized the productivity of money" and "did not think money sterile at all." Aristotle's medieval students (including Aquinas) "probably misunderstood" his remark about usury's "unnaturalness" and accordingly took him to have affirmed an irremediably confused doctrine of money's natural "sterility." For the reasons already given, I do not think this is true of Aquinas.

91 This, at least, was how Scholastics desirous of defending the contract analyzed it. Formally, the contract was typically much simpler and, on its face, barely distinguishable from a loan at interest. See Noonan, *Scholastic Analysis*, 270.

arrangement therefore came to be called the "triple contract." Each of the three components of the contract, considered in itself, is certainly licit. It could be (and sometimes was) argued that their combination is nonetheless illicit because it is, in Noonan's words, "virtually indistinguishable from a loan at usury."[92] However, if the investor had openly lent the sum that he in fact invested, he would have forgone the opportunity of sharing in any profit from the projected business venture. He would thus have incurred what both he and his debtor deem a probable loss. (Unless both parties to the triple contract expect the venture to be profitable, the contract would be senseless.) He could, consequently, have licitly demanded from his debtor something in addition to his principal, in compensation for the loss. But this, in turn, would make their arrangement "virtually indistinguishable" from the triple contract. In effect, then, the triple contract seems to be "merely a roundabout way of legitimating *lucrum cessans*."[93]

The development of the triple contract in the later Middle Ages would revolutionize commerce. For the investor, the triple contract is both profitable and (virtually) free of risk. In Noonan's view, its acceptance by the later Scholastics consequently involved the rejection of "two great pillars

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92 Noonan, *Scholastic Analysis*, 205.

93 Noonan, *Scholastic Analysis*, 229. Surprisingly, in the bull *Detestabilis Avaritia* (1586), Pope Sixtus V apparently condemned the triple contract. He condemned all agreements by which "it is guaranteed to persons giving money . . . in the name of a partnership that, even if in some fortuitous case some disaster, loss, or lack happens to occur, the principal will always be safe and restored entire by the partner receiving it" (quoted in Noonan, "Usury," 90.) However, as Noonan acknowledges (101), Sixtus may well not have intended to condemn the triple contract, despite appearances. In *Scholastic Analysis*, after a brief review of relevant evidence from the late sixteenth century to the eighteenth century, Noonan concludes that "neither by the common opinion of theologians, nor by authority itself was the interpretation supported that [*Detestabilis*] definitely outlawed the triple contract" (221). This partly explains why most subsequent Catholic theologians have had few qualms about affirming the liceity of the triple contract. Yet it would be a mistake to suppose that they have simply disregarded the surface sense of *Detestabilis*. In his *Compendium theologiae moralis* (first published in 1850), which Noonan describes as "a standard theological textbook" (387), the eminent Jesuit Jean-Pierre Gury says that there are two "probable" opinions about the triple contract among theologians. The first denies that the contract is licit, partly because of its (apparent) condemnation in *Detestabilis* (*Compendium theologiae moralis*, 4th ed. [Tournai, 1852], no. 919). Noonan claims that, less than twenty years after its promulgation, *Detestabilis* had been reduced to "an aberrant nullity" ("Usury," 102) but, since a "standard theological textbook" published more than 250 years after the bull's promulgation takes its surface sense so seriously, this is clearly a gross exaggeration.

of the usury theory, the doctrines that an investor must run a risk to make a profit and that money must be considered as unfruitful."[94] This is one reason why, in his paper on the alleged "amendment" of papal teaching on usury by sixteenth-century theologians, he says that the theologians' new "theological analysis" rested on principles—in this case, those permitting partnerships and insurance—that "undercut the usury prohibition." In fact, as we have seen, Aquinas's analysis of usury does not require him to reject either partnerships or insurance, since it does not presuppose that an investor *must* run a risk to make a profit. He does indeed accept that money is naturally "unfruitful," but only in the innocuous sense that, unlike seeds or fields, it does not immediately bear fruit. There is no clear evidence that he accepts the (obscure) thesis that it is "unnatural" for money to "breed." More importantly, it *is* clear that, if he accepts Aristotle's objection to making money "from money itself," as he seems to do, this is perfectly compatible with his acceptance of the *societas*. While he might indeed have rejected the triple contract, this would not have been due to either his understanding of money or to his analyses of loans and partnerships.[95]

Selling Time

The apologist for usury might agree with Aquinas that the use and ownership of money are inseparable and cannot, therefore, be sold separately. However, he might argue that what the usurer sells is not the use of money merely as such, but rather its use (and ownership) *now instead of later*. Put differently, the usurer sells the *convenience* of having (and using) money now instead of later. The institution of money-lending, after all, is based on the assumed ability of most would-be borrowers eventually to acquire the sum they wish to borrow by means other than borrowing (else most debts could not be settled). They seek to borrow this sum only because they want or need it sooner than they could acquire it by other means. The very *raison d'être* of money-lending is to save borrowers time. Is it not just that they should pay for this convenience?

This is not an argument that Aquinas considers in his *ex professo* treatments of usury. However, his discussion of selling goods for more than their worth in the *Summa* gives a clue as to how he would respond to it. When the buyer, in virtue of some accidental circumstance affecting him, derives "a great advantage" from the good he buys, the seller has no right,

94 Noonan, *Scholastic Analysis*, 203.

95 It would rather have been due to his rigorist views on *damnum emergens*, to be discussed below.

other things being equal, to charge more than the usual price.[96] This is because "the advantage accruing to the buyer is not due to the seller, but to a circumstance affecting the buyer." An international tourist anxious to reach the airport in time to make his flight home might be prepared to pay an exorbitant cab fare so as not to be stranded in a foreign country, but his driver would have no right to charge him more than the standard rate merely because he is running late. No man, says Aquinas, should "sell what is not his." Similarly, the convenience to a borrower of having money *now* instead of later is due to some accidental circumstance affecting him. If the lender exploits this circumstance by charging interest, he "sells what is not his." Put simply, if crudely, he sells time. The wrongfulness of "selling time" would become a standard Scholastic objection to usury. Aquinas apparently considers usurious *any* transaction that involves "selling time," even if no money is formally lent.[97]

It might be objected that the advantage to borrowers of having money now instead of later is not due to any "accidental" circumstance affecting this or that borrower, but reflects what economists call "time-preference": the universal human desire (other things being equal) to have things sooner rather than later. Woods finds in the phenomenon of time-preference "the origin and justification for the payment of interest."[98] Like many libertarians, Woods is a devotee of the Austrian school of economics and apparently accepts the Austrian view that time-preference is an irreducible feature of human action.[99] It was the Scholastics' (alleged) failure to take time-preference into account, he suggests, that above all else vitiated their analysis of usury. Since people "prefer a given quantity of a good in the present to the same quantity of the good in the future," they effectively treat the present and future goods as *different goods*. They do not

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96 Aquinas, *ST* II-II, q. 77, a. 1, resp. Aquinas does not use the expression "accidental circumstance," but he does speak of buying and selling "considered as accidentally [*per accidens*] tending to the advantage of one party." It will be convenient in what follows to speak of "accidental circumstances" rendering a transaction unusually advantageous to a buyer (or to a borrower).

97 See *ST* II-II, q. 78, a. 2, ad 7, and his letter to James Viterbo on credit sales, *De emptione et venditione ad tempus*.

98 Thomas Woods, *The Church and the Market: A Catholic Defense of the Free Economy* (Lanham, MD: Lexington Books, 2006), 117.

99 Ludwig von Mises, *Human Action: A Treatise on Economics*, 4th rev. ed. (Little Rock, AR: Fox and Wilkes, 1996), 484. Non-Austrian economists are likelier to seek explanations of time-preference in terms of other (e.g., psychological) phenomena. For a brief discussion of this issue, and for an argument that something like time-preference is recognized by Aristotle, see Langholm, *Aristotelian Analysis*, 138–44.

"consider $100 today and $100 ten years from now to be the same good," even apart from inflation.[100] Woods here presupposes the subjectivism about economic value standard among Austrian economists. Two token goods can be said to be of "the same" kind only from the point of view of an economic actor who values each in the same way.[101] It is not, then, necessarily true that "more is asked than is given" when a lender charges interest. If neither lender nor borrower treats as equivalent in value a given sum of money today and the same sum in the future, then, as Woods says, "it would appear to be unjust *not* to pay interest." Since the (subjective) inequality in value of nominally equal sums at different times is supposed to be a necessary consequence of the phenomenon of time-preference, we are here confronted with a putative interest title intrinsic to the act of lending. If, therefore, Woods's argument was sound, it would undermine the usury prohibition.[102]

Woods's assertion that people do not consider a given quantity of a good in the present and the same quantity of the good in the future "the same good" is untrue in one straightforward sense. A man would not naturally *say* that $100 currently in his wallet is "a different good" from $100 he expects to receive in a month. More importantly, the proposition that a given quantity of a certain good in the present is "a different good" from the same quantity of *the same good* in the future is self-contradictory. Woods's assertion seems to entail that it is impossible even to give a coherent description of the phenomenon of time-preference. His own description of the phenomenon—"man prefers the enjoyment of a good

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100 Woods, *The Church and the Market*, 117–18.

101 Murray N. Rothbard, *Man, Economy and State* (Auburn, AL: Ludwig von Mises Institute, 2001), 18–19. Rothbard gives the example of an economic actor who (for whatever reason) considers one pound of butter of better quality than another and says that "the two "butters" are really *different goods* from the point of view of the actor" (19).

102 Since Woods writes as a Catholic, it is worth noting that he neglects to mention an authoritative, though not per se infallible, magisterial intervention seemingly unfavorable to his argument. The Holy Office in 1679 condemned the proposition that, "since ready cash is more valuable than that to be paid, and since there is no one who does not consider ready cash of greater worth than future cash, a creditor can demand something beyond the principal from the borrower, and for this reason be excused from usury" (Denzinger, no. 1191). The condemned proposition, however, is probably not speaking of what Austrian economists would call time-preference, but rather of preference for ready cash over future cash due to apprehensions regarding uncertain future contingencies. Dempsey remarks that the later Scholastics "readily admitted" the "lesser value of future goods generally, though not universally" (*Interest and Usury*, 175).

in the present to the enjoyment of *the same good* in the future"[103]—brings the problem out clearly. It will not do to say that, though the present and future goods are really the same, economic actors "consider" them different. Other difficulties aside, if a man does not consider any token good he might enjoy in the present to be of "the same" kind, in *some* sense, as any token good he might enjoy in the future, we cannot meaningfully ascribe to him a preference (other things being equal) for present to future enjoyment of goods. He will certainly prefer some future goods to some present ones, and it is only by comparing his preference for future goods of a certain kind and quantity with future goods of the *same* kind and quantity that his general preference for present to future enjoyment of goods becomes manifest.

Woods's real concern is not with whether people "consider" present and future goods to be in some sense "different goods," but with the influence of time-preference on *exchange*. After saying that people "prefer a given quantity of a good in the present to the same quantity of the good in the future," he adds that "only an increased amount of the good in the future can persuade them to forego a given amount of consumption in the present."[104] People treat present and future goods of the same kind and quantity as "different goods" inasmuch as they will not exchange a given, already present quantity of a good for the same future quantity, but only for a greater quantity. If this were true, however, no one would ever lend money (or anything else) without charging interest. Since, in fact, people do lend without charging interest, Woods's claim needs to be qualified. We might say this: given the universal human preference for present to future enjoyment, a man who exchanges a given, already present quantity of a good for some future quantity of the same good *either* will demand that the future quantity be greater *or* will have some motive for making the exchange apart from the future enjoyment of (the same quantity of) the good. But this is trivial, and the Scholastics who condemned usury would not deny it. Undoubtedly a man who lends money gratis does not do so merely because he looks forward to enjoying his principal again in the future.[105] He might act out of solicitude for a friend in need or, when

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103 Woods, *Church and Market*, 117 (emphasis mine).

104 Woods, *Church and Market*, 117. Stated more precisely, Woods's claim is that, if people are to forego consumption of a certain quantity of a good in the present *in exchange for a certain quantity of the same good in the future*, they will only do so if the latter quantity is greater than the former.

105 As well as saying that people treat present and future goods of the same kind and quantity as "different goods," Woods says that "a good in the present will be valued more than the same quantity of that good in the future" (*Church and Market*,

lending to a stranger, out of Christian charity.

It could be argued, in a Woodsian spirit, that a moneylender deserves remuneration for enabling the borrower to satisfy his preference to enjoy money sooner rather than later, or that he deserves compensation for the frustration of *his* preference to enjoy money sooner rather than later (or both). In either case we would have an interest title intrinsic to the act of lending. Aquinas would doubtless maintain that this Woodsian argumentation amounts to a rationalization for "selling time," and would on this account reject both titles. Regarding the first, he might say that it makes no essential difference that the "advantage" of having money sooner rather than later is not "accidental" (in the sense of being due to circumstances peculiar to this borrower or that). Even though time-preference is universal, to sell this advantage is to sell what is not one's own. Regarding the second, we may usefully consider his discussion of just compensation for lenders. He says that a lender may seek compensation for "the loss he incurs [as an accidental result of lending] of something he ought to have" and adds that, if the borrower "avoids a greater loss than the lender incurs," he may "repay the lender with what he has gained."[106] The "loss" (*damnum*) of something one "ought to have" (*debet habere*) presumably means more than the mere frustration of one's natural preference to enjoy goods sooner rather than later.[107] Aquinas might then say that to demand compensation simply for forgoing present enjoyment is tantamount to treating impatience (however natural) as compensable loss.

If this is correct, it would partly reflect an important difference between Aquinas and contemporary economists, Austrian or otherwise. Where contemporary economists speak of "demand," meaning consumer *desire* for goods (together with ability and willingness to pay for them), Aquinas speaks of human *need* (*indigentia*).[108] It is reasonable to interpret this term quite broadly. While we are accustomed to a rough distinction between "needs" and "wants," *indigentia* in this context apparently means the lack of means to satisfy any natural human appetite. (Aquinas speaks a little later of a man possessed of grain but "in need" (*indiget*) of wine, who consequently exchanges grain for wine.) Given this broad use of "need," it

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118). This might misleadingly suggest that a man presently values a given quantity of a certain good more than he *will* value the same quantity of the same good in the future, which is of course not what Woods means.

106 Aquinas, *ST*, II-II, q. 78, a. 2, ad 1.

107 I discuss the meaning of this formula at greater length later.

108 Aquinas, *In* V *eth*., lec. 9. In the translation by C. I. Litzinger (Notre Dame, IN.: Dumb Ox, 1993), *indigentia* is sometimes rendered "need" and sometimes "demand."

may seem that the difference between Aquinas and contemporary economists is little more than verbal. All "demand" is surely for goods or services that in some way serve to satisfy human appetite.[109] However, it is implausible to suggest that human beings *need* to enjoy goods sooner rather than later, even in Aquinas's broad sense of "need."[110]

Aquinas regards human need not only as the mainspring of exchange but as a "measure" of the equity of exchanges.[111] Following Aristotle, he gives the hypothetical example of a farmer and a shoemaker exchanging food for shoes. Since food is more useful than shoes for satisfying human need, exchanging one bushel of wheat for one pair of shoes would be unjust. I shall say more about this thesis of need as the "measure" of equity in exchange in the following section, when considering the relation between Aquinas's usury analysis and his just-price theory. Here I observe that, if Aquinas is right to identify the satisfaction of *indigentia*, in contradistinction to the satisfaction of "demand," both as the final cause of exchange and as the measure of equity in exchange, time-preference alone cannot be a sufficient basis for legitimate interest titles, even apart from the issue of "selling what is not one's own." Neither the satisfaction of a borrower's time-preference nor the frustration of a lender's is relevant to the justice or injustice of a lending transaction, or indeed of any other exchange. A borrowed good serves to satisfy some natural appetite of the borrower. Thanks to the lender, this appetite is satisfied sooner than it otherwise would have been, but this does not mean that the lender has enabled the borrower to satisfy an *additional* appetite (for enjoyment sooner rather than later) and thereby earned additional remuneration.[112] Similarly, a compensable "loss" is the deprivation of means to satisfy appetite, not merely the postponement of satisfaction.[113]

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109 Finnis suggests that Aquinas's "need" *is* practically equivalent to what contemporary economists call "demand" (*Aquinas*, 201–2).

110 Very often, of course, people *do* need specific goods (e.g., medicine, food) sooner rather than later, but this has nothing to do with time-preference as understood by Austrian economists.

111 Aquinas, *In* V *eth*., lec. 9.

112 When treating of usury's injustice in the *Sentences* commentary, Aquinas considers the objection that one who lends to another "does something advantageous for him" (*aliquod commodum ei facit*), for which some recompense is fitting. His flat response is that "the benefit of a loan [*beneficium mutui*] is not more than the money loaned" (*In* III *sent*., d. 37, q. 1, a. 6, arg. 2 and ad 2).

113 In *ST*, II-II, q. 62, a. 8, Aquinas says that it is a sin against justice to delay making "restitution" of what is rightfully another's (such as wages), since this is "to deprive [the other] of the use of what belongs to him, and to do him an injury." This might seem a possible basis for claiming that the mere postponement of satisfaction is, or

Loans, Sales, and the Just Price

In the preceding two sections I examined, and rejected, Noonan's charge that Aquinas's usury analysis is internally inconsistent and Woods's argument that the analysis neglects the phenomenon of time-preference. In this section I examine, and reject, Noonan's further charge that Aquinas's usury analysis is in tension with his just-price theory.

Aquinas's major argument for the injustice of usury has the strange-sounding corollary that, strictly speaking, money cannot be lent. (More precisely, money cannot be lent if the borrower plans to put it to its primary or proper use.) To grant the use of a good whose use consists in its consumption is necessarily, as Aquinas says, "to transfer the ownership." This is clearer in the case of wine or wheat than in the case of money. If someone "lends" a bottle of wine, on the understanding that it is to be drunk (put to its proper use), he can demand in return another bottle of wine, perhaps of the same grape and vintage, but not the "lent" wine itself. Likewise, the money paid at a loan's maturity is not *the same* money that was originally "lent"; it is only the same quantity of money. The English language nonetheless has no other word than "loan" for this transaction. In Roman law, by contrast, a "loan" of money or of some other good consumable in use was called a *mutuum*, while a loan of a good not consumable in use was called a *commodatum*. Roman law recognized that, in a *mutuum*, but not in a *commodatum*, ownership is transferred. Aquinas's mature treatments of usury are intended to show, firstly, that the legal distinction between *mutuum* and *commodatum* is founded in the nature of things (viz., in the natural distinction between goods consumable or not consumable in use[114]) and, secondly, that charging for use in the context of a *mutuum* is unjust.

It is presumably because the money paid at a loan's maturity is not the

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can be, a compensable "injury" or "loss." However, Aquinas specifically refers here to "withhold[ing] the property of another *against the owner's will*." This circumstance, absent in the case of a voluntary loan, is apparently a necessary condition for delay in restitution to be an "injury."

114 In his earliest treatment of usury in the commentary on the *Sentences* of Peter Lombard, by contrast, he seemingly takes the legal distinction for granted, stating without argument that when money is "lent" (*mutuatur*), ownership is transferred, which is not the case when a house, for instance, is lent (*In* III *sent*., d. 37, q. 1, a. 6, resp.). He goes on to say that it "seems just" to receive payment for the use of a lent good which remains one's own, but that to receive payment for the use of a "lent" good that is in fact no longer one's own is nothing other than to receive payment for the use that someone else makes of *his own* property. To demand such payment is to practice a kind of "extortion" (*exactio*).

actual money originally "lent," but only the same quantity of money, that Aquinas is prepared to speak of "*selling* the same thing twice," even though we would not normally say that a moneylender who does *not* charge interest "sells" a certain quantity of money in exchange for the same quantity (payable at a later date). When treating of Aquinas on usury, John Finnis accordingly goes so far as to say that "a loan of money is strictly speaking a sale of the money, the purchase price being payable at the end of the loan."[115] Aquinas himself says that "money cannot be sold [*vendi*] for a greater sum than the amount lent, which has to be paid back" (*ST* II-II, q. 78, a. 2, ad 4), which seems to imply that money *can* justly be "sold" for a sum equivalent to the amount lent. If a loan of money is truly a sale, then demanding usury would seem to be only a special case of charging an (allegedly) unjust price.

Yet Aquinas nowhere characterizes usury as the charging of an unjust price. On the contrary, he formally separates questions relating to just and unjust prices from questions relating to usury. He distinguishes the sin of "cheating," which "is committed in buying and selling," from the sin of usury, which "takes place in loans," and he devotes a distinct *quaestio* in the *Summa* to each sin. It is in the *quaestio* on cheating that he discusses just pricing. There is no suggestion that the treatment of usury is merely an application to a specific case of general principles articulated in the treatment of cheating. Noonan strenuously denies that Aquinas or any other Scholastic treats usury as the charging of an unjust price. The problem of the just price, he says, is treated by the Scholastics "from an entirely different viewpoint than that from which usury is considered."[116] In fact, if the principles of just-price theory had been applied to money-lending, they would have undermined the natural-law arguments against usury. The Scholastic "just price," he claims, is normally what modern economists call the market price: "the price where demand and supply meet."[117] As we will see shortly, with one important qualification, this seems correct in the case of Aquinas.

Since the just price is the market price, Noonan continues, it is "thoroughly variable, neither fixed nor precise," and "radically subjective."[118] The Scholastics recognized that the market prices of some goods would normally differ at different times. Wheat, for instance, would normally sell for more in summer than in autumn. Since the market price is the just

115 Finnis, *Aquinas*, 204n111.
116 Noonan, *Scholastic Analysis*, 82.
117 Noonan, *Scholastic Analysis*, 85.
118 Noonan, *Scholastic Analysis*, 89.

price, selling wheat on credit in autumn for what it will probably be worth in summer is not unjust if the debtor is to pay in summer. But if lending money at interest actually means selling on credit a certain sum of money for a price (nominally) higher than this sum, a usurer might argue that he is not charging an unjust price, since the value of money likewise changes. If he sells the sum when money is more in demand and receives his payment at a later time when money is less in demand, he "give[s] money when its value is high for money when its value is low" and hence "should be able to ask a premium."[119]

Since Scholastic just-price theory would undermine the natural-law arguments against usury if applied to money loans, Aquinas and the later Scholastics were compelled, Noonan claims, to deny that money loans are sales. In stark contrast to Finnis, Noonan interprets Aquinas as holding that money *cannot* be sold. Money is "formally nonvendible."[120] This thesis, Noonan says, is "an essential part" of the Scholastic analysis of usury from Aquinas onwards,[121] precisely because it enables the Scholastics to avoid "a formal contradiction between the just price theory and the usury theory."[122] Holding money to be nonvendible, they could regard it as "exempt from the laws [*sic*] of supply and demand," hence (normally) of unchanging value. Whereas the exchange value of other goods is determined by market forces, for the Scholastics the value of currency is "fixed by the state."[123]

No modern economist would accept that money is "exempt from the law of supply and demand." If Noonan is right that the usury analysis of Aquinas and his successors was "completely committed to the concept of an unvarying value,"[124] it would seem to follow that the Scholastic natural-law arguments against usury are premised on an economic error.[125]

In order to evaluate Noonan's charge that Aquinas avoids a contradiction between his usury analysis and his just-price theory only by erroneously holding money to be exempt from market forces, it is necessary firstly to consider Aquinas's just-price theory in somewhat more detail than Noonan does. I will here sketch what I take to be its rudiments. I noted in the previous section that, for Aquinas, human need is both the final cause

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119 Noonan, *Scholastic Analysis*, 93.

120 Noonan, *Scholastic Analysis*, 53. Noonan does not comment on the passages in which Aquinas's language nonetheless suggests that money loans *are* sales.

121 Noonan, *Scholastic Analysis*, 81.

122 Noonan, *Scholastic Analysis*, 94.

123 Noonan, *Scholastic Analysis*, 94.

124 Noonan, *Scholastic Analysis*, 397.

125 Noonan himself does not explicitly draw this conclusion, but it is not clear how he could avoid it.

of exchange and the measure of equity in exchange. To exchange one bushel of wheat for one pair of shoes would be unjust, because food is more useful than shoes for satisfying human need. Aquinas adds that, since producing a bushel of wheat is more burdensome to the farmer than producing one pair of shoes is to the cobbler, to exchange one bushel of wheat for one pair of shoes would be unjust also for this reason.[126] He recognizes, of course, that it is impossible to quantify precisely the relative usefulness of different goods for satisfying human need and that there is no necessary correlation between a good's relative usefulness and the relative burdensomeness of producing it. The purpose of money, he claims, is to ensure something like proportionality in the usefulness of exchanged goods. He does not explain precisely how money is to fulfill this purpose. However, it is not difficult to make the case that a money economy serves to ensure (something like) equity in respect *both* of the comparative usefulness of different exchanged goods *and* of the comparative burdensomeness of their production.

In general, the more a good satisfies human need, the more "demand" there will be for it—that is, the more money will be spent on it.[127] (Since supply will often tend to be correspondingly high, the unit price of the good need not be higher than the unit price of other, less useful goods whose supply is lower.) Again, other things being equal, more burdensome work will tend to receive higher wages than less burdensome work.[128] It follows that the market price for any good at any given time will tend to reflect both its usefulness for satisfying human need and the burdensomeness of its production. Hence, the seller will receive in return for it money equivalent in value to goods that are comparably useful and/or burdensome to produce. Aquinas's remarks thus suggest the thought that an unrestricted free market will tend to yield roughly just outcomes,[129] though his general approach certainly does not rule out governmental intervention

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126 Aquinas, *In* V *eth*., lec. 9.

127 The demand for some goods will naturally be subject to seasonal variability, as noted above.

128 The "burdensomeness" of producing a certain good means, amongst other things, the hours spent on it, the physical and/or intellectual demands of producing it, the costs of producing it, and the dangers of the production process.

129 John Baldwin suggests a development of Thomist thought about the just price along the lines here limned (*Medieval Theories of the Just Price: Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries*, Transactions of the American Philosophical Society n.s. 49/4 [Philadelphia: American Philosophical Society, 1959], 78–79). One might raise a question about whether, under modern conditions, market *wages* will necessarily be just, a topic beyond the purview of this essay.

to forestall or remedy "market failure." He would therefore be prepared to accept Noonan's virtual identification of the Scholastic "just price" with the market price, but he would insist that it is *need*, rather than "demand" in the contemporary sense, that codetermines just prices.

It should be clear from this sketch that, whatever may be true of other Scholastics, Aquinas certainly did not treat the problem of the just price from "an entirely different viewpoint" than he treated usury. Though clearly distinct, his treatments of each subject share a common root in the simple thought that a just exchange is an equitable one. Noonan obscures this fact by neglecting to explain *why* it is that, for Aquinas, the just price is normally the market price.

Does Aquinas's major argument against usury necessarily presuppose that money is "exempt from the law of supply and demand," as Noonan contends? Since the nub of this argument is the injustice of selling the same thing twice (or of selling something that does not exist), it is far from clear that it does. It is true, of course, that if a *mutuum* of money or any other good consumptible in use is even to be possible, a non-arbitrary criterion must be available for what is to count as a token good "of the same kind and quantity" as the good whose ownership is transferred. Since the relevant criterion in the case of money is purchasing power, the fact that a currency's purchasing power may change as a result of changes in supply of or demand for it certainly means that the nominal equivalent of the principal may be less or more than the amount that, at the loan's maturity, would have the same purchasing power. Though Noonan asserts that Aquinas was "completely committed" to the thesis of money's "unvarying value," Aquinas was in fact aware that the purchasing power of money is not constant.[130] He does not mention the possibility of changes in purchasing power when discussing usury (perhaps because currencies tended to be more stable in thirteenth-century Europe than they would later become), but his argument against usury can easily be reformulated in such a way as to make good this omission. If a loan of $10,000 is made for one year, during which the rate of inflation is 2 percent, then $10,200 at the time of the loan's maturity is equivalent, in the morally relevant sense, to the principal. To the extent that changes in purchasing power are measurable, it is just to take them into account when settling *mutua*—and, to the extent that such changes are predictable, it is just to take them into account when first negotiating the contracts. Noonan gives no reason for doubting that Aquinas would have accepted this development of his argument.[131]

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130 Aquinas, *In* V *eth*., lec. 9

131 Some late Scholastics recognized the phenomenon of inflation and nonetheless

Aquinas does not, then, need to hold that money is "exempt from the law of supply and demand" in order to make his case. Still less does he need to hold that money is "formally nonvendible." The basis for Noonan's claim that he nonetheless *does* hold money to be formally nonvendible is a passage in the *Sentences* commentary. Aquinas is here presenting an argument for the injustice of usury quite different from the argument premised on the distinction between goods whose use does or does not consist in their consumption.[132] He says that, whereas goods other than money have some utility "from themselves," money does not, but is instead "the measure of utility of other things."[133] Consequently, the utility of the *use* of money does not have its measure from the used money itself, but from "the things which are measured by money according to the different persons who exchange money for goods." Hence, "to receive more money for less seems nothing other than to diversify the measure in giving and receiving, which manifestly contains iniquity." In this argument, Noonan claims, money is "conceived as having one constant, fixed value." As we have already seen, however, Aquinas accepts that money is *not* of unvarying value. This is consistent with the claim that the usurer "diversifies the measure in giving and receiving." As in his mature discussions of usury, Aquinas is assuming for simplicity's sake that the purchasing power of money remains constant during the loan period. (If in fact the value of money diminishes during this period, a nominal addition to the principal need not "diversify the measure in giving and receiving"; it may instead represent an allowance for a pre-existing "diversification.") Noonan believes that it follows from money's being "formally a stable measure" that it "cannot be sold." The rationale for this inference is unclear to me, and Aquinas nowhere draws it. What, in any case, would it mean to deny that money can be sold? What does it mean to "sell" money? If it means to exchange money for non-monetary goods, then Aquinas would certainly not deny that money can be sold, even if he might object to describing exchange of this kind as "selling" money.[134] If to sell money means to

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saw no difficulty in condemning usury. See Dempsey, *Interest and Usury*, 156–57. Franks argues that Aquinas "could accept" inflation premiums in loan contracts ("Usury Prohibition and Natural Law," 640).

132 This is the second anti-usury argument he offers in the commentary, both in *In* III *sent.*, d. 37, q. 1, a. 6, resp.; see the comments in note 114 above for the first.

133 Quoted in Noonan, *Scholastic Analysis*, 52.

134 To "sell" something ordinarily means "to give it *in exchange for money*." Except in the case of currency exchange, to speak of "selling money" is to depart from ordinary linguistic usage. This usage is not arbitrary, since it reflects the unique character of money as a "medium of exchange." The ordinary language objection

exchange a given quantity of a certain currency for some quantity of the *same* currency, then, as we saw earlier, Aquinas himself calls this "selling" money.[135] If, finally, to sell money means to exchange a given quantity of a certain currency for some quantity of a *different* currency, there is again no obvious reason why Aquinas should deny that money can be sold, though he nowhere discusses this kind of transaction.

Here it is worth considering certain problems regarding currency exchange. We saw above that, according to the Noonan of 1969, theologians in the late sixteenth century fashioned a novel "theological analysis" that "undercut the usury rule." One facet of this "analysis" was the allegedly untraditional admission that money was vendible, and currency exchange licit. The (alleged) danger in admitting the liceity of currency exchange lies in the possibility of currency dealers *profiting* from such exchange. Noonan poses the question: "If money could be purchased at a profit in foreign exchange transactions, why could it not be purchased at a profit in loans?"[136] Once the sale of currency is permitted, he claims, this question becomes pressing and threatens to "wreck the usury prohibition completely." Though he here gives the impression that the question is difficult to answer, it is actually quite easy. The great Renaissance Thomist Cardinal Cajetan supplies the answer in his 1506 treatise *De cambiis*.[137]

Following Aristotle and Aquinas, Cajetan declares that the "universal rule for exchanges is that the equality between a thing and another thing is to be preserved, so that, then, an equal is to be given for what has been received, and vice versa."[138] This, of course, is the basis for the usury prohibition. It also means that, in a just currency exchange, "there must be an

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to talk of "selling money" obviously has no bearing on the substantive question of whether Aquinas's arguments against usury ignore the reality that market forces bring about changes in the purchasing power of money. For the reasons already given, I do not believe they do.

135 Is it, then, a "sale" or (as ordinary usage would have it) a "loan"? I do not think any substantive issue turns on the answer to this question. What is normally called a "loan" of money differs from other loans in that what is returned is not the loaned good, but only its equivalent. Yet this transaction differs from normal "sales" in that a good of one type is not exchanged for a good of a different type. Provided we are clear about the transaction's character, it hardly matters whether we call it a loan or a sale.

136 Noonan, "Usury," 84.

137 In *Scholastic Analysis*, 313, Noonan describes this text as "the most thorough and influential scholastic treatise on exchange of its age."

138 Cajetan, *De cambiis*, ch. 6. I am using the translation in Cajetan, *On Exchange and Usury*, trans. Patrick T. Brannan (Grand Rapids, MI: Christian's Library, 2014), 35.

exchange of coins of equal value." However, by making multiple currency exchanges, in each of which the coins given and received are of equal value, a currency dealer may nonetheless make a profit, since the value of a currency varies from place to place and from time to time due to forces of supply and demand. It is by anticipating and exploiting such variation that currency dealers seek to make a profit.[139] Recognizing these facts, Cajetan says that, since equality "can be observed in several ways in accordance with different coins and places and times, it is . . . possible for profit to come to money changers while equality is preserved." The difference between this kind of profitable activity and that of the usurer is evident. The exchange dealer profits from a series of equitable exchanges; the usurer profits from an inequitable exchange.

To be sure, sixteenth-century exchange dealers also engaged in profitable activities that were not so readily defensible. Some of their operations, Noonan notes, "had the effect of a short-term loan with an interest rate determined by fluctuations in the exchange market."[140] Some, in fact, were unquestionably disguised loans at usury. This was the case with so-called "dry exchange," a cumbersome arrangement that the eminent economic historian Raymond de Roover bluntly calls "a spurious exchange transaction."[141] In reality, Roover says, it was "a straight loan (and nothing else) from which the lender expected a return." Noonan likewise says in *Scholastic Analysis* that the name "exchange" in the case of "dry exchange" was "deliberately used as a cover for a pure loan involving no real exchange sale in any way."[142] It is no wonder, then, that Pius V condemned dry exchange in *In Eam*.[143] By Noonan's own account, later theologians who "resisted" this bull's teaching did not seek to defend dry exchange;[144] they rather advanced a narrower view of what counted as dry exchange.[145] This presum-

139 Noonan relates that one of the sixteenth-century controversies surrounding exchange banking concerned the "theoretical ground" for the exchange-bankers' profits. Pope Pius V, in the bull *In Eam* (1571), implicitly "rejected the theory that the banker's profit depended on the supply and demand for money" (Noonan, "Usury," 90). Subsequent theologians who disregarded *this* part of the bull's teaching were surely right to do so, since the dependence of an exchange-banker's profit on the supply and demand for money is incontestable.

140 Noonan, "Usury," 84.

141 Raymond de Roover, "What is Dry Exchange? A Contribution to the Study of English Mercantilism," *Journal of Political Economy* 52, no.3 (1944): 250–66, at 264.

142 Noonan, *Scholastic Analysis*, 177.

143 Noonan, "Usury," 89.

144 Noonan, "Usury," 103.

145 Noonan, "Usury," 100–101.

ably reflects the unusual complexity and consequent moral obscurity of some of the bankers' operations. As the staunchly traditional Anscombe remarks when discussing the development of exchange banking, "it is pretty clear that we are at a stage when it is excessively difficult to distinguish, to say what is legitimate and what is not, on the old principles."[146]

The *Census*

We have seen that the main ostensible inconsistencies in "the old theory," which Noonan claims were successfully exploited by sixteenth-century theologians to subvert the usury prohibition, are in truth nonexistent. Aquinas, the chief architect of "the old theory," would have had no reason to object to the triple contract[147] or to (profitable) currency exchange. To defend these practices is not to subvert the usury prohibition. The sixteenth-century theologians also sought to defend certain papally condemned forms of the contract known as a *census*, which existed in Aquinas's day but about which he says nothing. As we shall see, to defend *these* contracts *would* be to subvert the usury prohibition. Since the *census* was at one time of considerable economic significance,[148] it is worth our while to touch on some of the moral questions surrounding it.

A *census* is "an obligation to pay an annual return from a fruitful good."[149] The owner of the good (e.g., a farm) would typically sell a *census* on it when he needed to raise money quickly. In three cases, Noonan observes, a *census* contract becomes "virtually identical with a loan," namely, when the "fruitful good" is the *census* seller's own labor (a "personal" *census*), when the *census* seller agrees to pay the "return" even if the fruitful good perishes or otherwise ceases to be fruitful (a "guaranteed" *census*), and—above all—when the *census* is redeemable at the *census* buyer's request (a "redeemable" *census*).[150] In each case, a *census* contract can easily become a cloak for usury, and Pius V condemned all three in *Cum Onus* (1569). Although the liberalizing sixteenth-century theologians sought to evade this condemnation, its *prima facie* reasonableness is clear.

Noonan contends that the theologians defended the condemned contracts (and thereby "undercut the usury rule") by appealing to a well-es-

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146 Anscombe, "Philosophers and Economists," 254.

147 I am here disregarding some of his severer statements about compensable loss, to be discussed later.

148 One indication of this is that the German word for "interest," *Zins*, is derived from *census*.

149 Noonan, *Scholastic Analysis*, 155

150 Noonan, "Usury," 82.

tablished Scholastic principle regarding "the sale of rights." In other words, they turned traditional thought against itself. They used a traditional principle to defend a radically untraditional conclusion. But what precisely was this principle? According to Noonan himself, the medieval Scholastics recognized the liceity of buying or selling "the right to an annual return *from some fruitful property like a farm*."[151] *This* principle in no way justifies the specific *census* contracts condemned in *Cum Onus*.[152]

I will not enter into the details of the theological discussion of the *census* before and after *Cum Onus*. I note, however, that Cleary, who is in general quite sympathetic to the liberalizing drift in modern Catholic thought about usury[153] and has "no doubt" that the triple contract is "lawful," nonetheless has serious "difficulties" regarding the condemned *census* contracts.[154] The redeemable *census* seems to him "substantially nothing else than an onerous loan," and even the *census* redeemable only by the seller "seems to present its difficulties."[155] Moreover, he adds, if usury is unlawful, a *census* can only be justified if its base is a fruitful good, of which the *census* buyer gets "some sort of ownership," and to a share of whose fruits he is consequently entitled. This seems to imply both that the *census* base cannot be the seller's own labor and that the buyer cannot licitly contract for a return that would continue even in the event of the fruitful good's destruction. In short, the distinctly non-rigorist Cleary sees no way of justifying the personal, guaranteed, or redeemable *census*.

Risk as a Title to Interest?

A moneylender cannot foresee the future. In negotiating a loan, he must reckon with the possibilities, however remote, of default. Since he must bear the risk of losing his money, it may seem just that he charge a premium for

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151 Noonan, "Usury," 82 (emphasis mine).

152 In his much more detailed discussion of *census* theory in *Scholastic Analysis*, Noonan acknowledges that, in fact, there was "considerable confusion" both in the Middle Ages and in the early modern period regarding "exactly what is sold in a *census*" (230). It was commonly asserted that what is (licitly) sold is simply "a right to money" (156). For reasons that need not detain us here, this more abstract *census* analysis *does* potentially threaten the usury prohibition, if the requirement of an enduring fruitful base is disregarded or abandoned. See 156–58 and 169–70.

153 In his 1957 study, Noonan goes so far as to say that Cleary writes "primarily as an apologist, anxious to justify the Church's permission of interest today" (*Scholastic Analysis*, 397), a charge that seems to me unfair, but not wholly unfounded.

154 Cleary, *Church and Usury*, 194. It is unclear whether the papal condemnation of the contracts weighs with him or not. He does not mention it when discussing his difficulties with the contracts.

155 Cleary, *Church and Usury*, 195.

bearing this risk. At the very least, it may seem just that he charge a premium in certain instances, when specific risk factors are present (e.g., when the borrower has a poor credit rating). In Anscombe's view, one cause or consequence of the Catholic Church's loss of clarity about the usury question was the widespread modern acceptance of risk as a title to interest—a title that she considers a "monstrosity."[156] Neither Aquinas nor, according to Noonan,[157] any other early Scholastic discussed it. In the fifteenth century, Saint Bernardine considered and rejected it, on the grounds that "to profit from this risk is to profit from the act of lending alone."[158] His reasoning was in one way surely sound. Since the future is necessarily uncertain, the abstract possibility of default is always present in a loan. "Risk," in *this* sense, would be a putative interest title intrinsic to the act of lending. To admit its validity would be to admit, in effect, that a lender may justly seek to "profit from the act of lending alone." This would destroy the usury prohibition. On the other hand, to charge a premium in specific instances, for specific risk factors, is not necessarily to "profit from the act of lending alone." In 1645, Jesuit missionaries in China asked the Sacred Congregation of the Propaganda whether Chinese Christians could lend at interest in view of risks associated with lending, and the Congregation replied that these Christians were "not to be disturbed" if they charged interest in view of "a probably imminent danger."[159] Anscombe attaches little weight to this decision,[160] but Noonan rightly observes that it represents "the most important approbation" the extrinsic risk title had yet received.

If a lender charges a premium based either on the general risk inherent in lending or on the risk specific to a particular case, what precisely is he charging *for*? For what good or service is he demanding payment, or for

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156 Anscombe, "Philosophers and Economists," 255.

157 Noonan, *Scholastic Analysis*, 129–30.

158 Noonan, *Scholastic Analysis*, 130.

159 Noonan, *Scholastic Analysis*, 289.

160 Anscombe says that it was made at an "unimportant" meeting of the Congregation, meaning "one whose decisions were not regarded as solemn ones" ("Philosophers and Economists," 255). Since, as Noonan notes, Pope Innocent X decreed that the decision was to be observed by all missionaries under pain of excommunication *latae sententiae*, this is questionable. However, the decision certainly does not represent an exercise of the Church's extraordinary (infallible) magisterium. Noonan notes the argument of the eighteenth-century rigorist Ballerini that the Congregation did not allow a charge for the simple risk of non-repayment, but rather for the risk of expenses that might be incurred in collecting a debt (*Scholastic Analysis*, 290). He does not express an opinion about this interpretation, but his later description of the Congregation's decision as "somewhat ambiguous" (292) suggests that he thinks Ballerini's interpretation defensible.

what actual or probable loss to himself is he demanding compensation? These are presumably the questions that Aquinas would put to defenders of the risk title. Offhand, there does not seem to be any good or service associated with the *risk* of lending apart from the lending itself—and Aquinas holds that the just "payment" for the lending itself, as we have seen, is simply the repayment of the principal. Risk *means* "risk of loss," and mere risk of loss is not the same as actual loss. If a given loan is so risky that the lender anticipates *probable* loss of his principal, it is doubtful that Aquinas would recognize this as a case of compensable loss. (As I will discuss in the next section, he does not allow a lender to demand compensation from the borrower for losses incurred through sheer foolishness.)

From a Thomist perspective, then, risk of default initially seems an unpromising candidate for an interest title. However, when discussing the circumstances in which it is licit to resell something for a higher price than one paid for it, Aquinas says that one may do this "on account of the danger [*periculum*] he incurs in transferring the thing from one place to another, or again in having it carried by another."[161] (Since the seller incurs this "danger" even when he does not transport the merchandise himself, Aquinas presumably has chiefly in mind the danger of the merchandise being lost or damaged, for instance during a hazardous sea voyage.) He thus admits that a *seller* may at least sometimes charge a premium for incurred risk. If a seller may justly charge only for goods or services rendered or for costs incurred, it would apparently follow that incurred risk is, or may be, a kind of compensable "loss." Be that as it may, it is anyhow sometimes permissible to charge a premium for risk. It is not immediately obvious why a moneylender who negotiates an unusually risky loan should not charge such a premium. What are we to make of Aquinas's silence about this possibility? It may be that he considered the case of the lender who risks default importantly different from the case of the seller who has risked his merchandise. The (prospective) seller puts his own property at risk for the sake of the (prospective) buyer and, should the property be lost or damaged *en route*, the planned sale will not go ahead and the would-be seller will have no claim on anyone to compensation. The moneylender, by contrast, alienates his property. During the period of the loan, nothing that he owns is at risk in connection with the loan. He does not, strictly speaking, put his own property at risk for the sake of the borrower. True, he accepts the risk that his debtor will default, yet, even if this happens, he will retain a legally enforceable claim on the defaulter.

This difference between the situations of the would-be seller and the

161 Aquinas, *ST* II-II, q. 77, a. 4, ad 4.

moneylender means that the latter can normally take precautionary measures unavailable to the former. The moneylender can demand that the lender insure the loan or else insure it himself (and charge the borrower the insurance premium).[162] He can include penalties for late repayment in the loan contract, and he can demand a pledge from the borrower. By taking one or more of these measures he may greatly reduce, if not eliminate, the risk he incurs through lending. If they are available options yet he insists instead on charging a risk premium, this is probably a sign that what he really seeks is not compensation for incurred risk, but profit from lending.[163]

It could be argued that the lender's fear of late repayment or non-repayment is a psychic "loss" for which he reasonably demands compensation.[164] If this fear is not founded on specific risk factors but simply on the impossibility of foreseeing the future, Aquinas might reply that the lender's natural fear of the mere possibility of late repayment or non-repayment, like the frustration of his natural preference to enjoy goods sooner rather than later, does not amount to a compensable "loss" of something he "ought to have." Even if the lender's fear is based on specific risk factors, it is at best unclear whether Aquinas would recognize it as a compensable loss. Moreover, the lender can normally allay this fear by taking one or more of the precautionary measures discussed in the preceding paragraph. If they are available and he insists instead on a risk premium, he is probably seeking profit from lending, not the allaying of fear.

Some of the later Scholastics compared a moneylender's charge of a premium for specific risk factors with the premium a landlord might charge a notoriously rash or negligent tenant, and with the premium a bailor might charge a bailee about to undertake a dangerous journey with the goods entrusted to him.[165] Both of the latter charges, it was assumed, are licit. Even if they are, there is still arguably a relevant difference between these cases and the case of a moneylender who charges a risk premium. Other things being equal, the greater a debtor's obligations to his creditor, the more likely it is that he will default on these obligations. If a moneylender fears default, there is a certain incongruity in his seeking to

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162 As noted earlier, this was not an option in Aquinas's day, though lenders could demand that borrowers find guarantors for their loans.

163 According to Noonan, all of the late Scholastic defenders of the risk title insisted that the borrower be given a choice between these options (*Scholastic Analysis*, 293).

164 This argument was made in the seventeenth century by Juan de Lugo (Noonan, *Scholastic Analysis*, 288).

165 Noonan, *Scholastic Analysis*, 284–88.

allay this fear by charging his debtor a premium, thereby increasing the risk of default. The landlord and the bailor, by contrast, in no way increase the risk to their property by charging risk premiums. Setting this incongruity aside, however, the liceity of the landlord's and bailor's risk premiums strikes me as doubtful. Just as the moneylender can normally have his loan insured, demand a pledge from the borrower, or stipulate penalties for late repayment, so too a landlord or bailor can normally take comparable measures if he has reasonable fears for his property.

Another late-Scholastic argument in defense of risk premiums on money loans compared such premiums with the fees charged by loan guarantors. Since the guarantor of a loan assumes the risk of the borrower's default or insolvency and acts justly in charging a fee for his service, it seems that the lender himself may likewise charge a fee for assuming what is in effect the same risk.[166] It is questionable, in fact, whether a guarantor does act justly in charging such a fee.[167] Supposing for argument's sake that he does, a difficulty remains. As the sixteenth-century Dominican Dominic Soto observed, the service performed by the guarantor of a loan is not the mere assumption of risk, but the obligation to repay the loan if the borrower should be unable to do so. If he is called on to fulfill this obligation, he performs a genuine service to both borrower and lender. Aquinas would likely argue that it is the conditional obligation to perform this service that he sells. The lender himself, in the nature of the case, cannot perform the same service. If the borrower defaults on an unsecured loan, the loan cannot be repaid. If there is no service akin to the guarantor's that the lender can assume a conditional obligation to perform, it is not clear what sellable good the borrower would be buying when he pays a risk premium. A lender can, of course, refrain from taking action against a defaulting borrower. Might he not justly charge a fee at the beginning of the loan for undertaking not to take action in the event of default? Even if the answer is yes, it does not follow that the lender has the right to make this arrangement a condition of lending. While he certainly has the right to secure himself against the risk of loss (e.g., by insisting that the borrower find a guarantor for the loan), he surely does not have the right to *insist* on forgoing such security and being paid for doing so.

The discussion to this point has focused on the occasional lender. The case is arguably different with the habitual lender. The more loans a lender makes, the greater the likelihood that at least some will not be repaid. It

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166 This argument was made by the sixteenth-century by Juan de Medina, the first Scholastic to defend the risk title (Noonan, *Scholastic Analysis*, 284).

167 See note 176, below.

may seem just that a habitual lender charge all of his customers a premium to protect himself against the *probable* defaults of a minority of them. In this case, surely, the premiums would collectively represent compensation for the (probable, eventual) loss of something he "ought to have."[168] We may compare this with the case of a businessman who charges each of his customers a small premium to protect himself against probable, occasional losses incurred in the course of his normal business activities. This seems unobjectionable. In this case, we would no longer be dealing with an interest title intrinsic to the act of lending. It is accidental to the act of lending that it be performed often or seldom. Admitting that habitual lenders may charge such a premium would not destroy the usury prohibition.

The case of the habitual lender, however, presents us with a problem unrelated to the question about risk as an interest title. We must distinguish between professional and non-professional habitual lenders. The latter simply devote an unusual quantity of their money and time to charitable lending, a straightforwardly meritorious activity (if undertaken for the right motives). For obvious reasons, non-professional habitual lenders will be relatively rare. In an advanced capitalist society, their lending activity will be negligible compared with that of professional lenders. But professional lenders clearly "seek profit in lending," at least in one sense. It is not surprising that, for most of the Middle Ages, it was generally supposed that professional lending is necessarily usurious. If professional lending necessarily violates the usury prohibition, it hardly matters whether habitual lenders violate the prohibition by charging a risk premium.

It was only after moral theologians had reconciled themselves to the papally approved charitable lending institutions known as *montes pietatis*[169] that they were prepared to admit the (possible) liceity of making a livelihood from lending.[170] The *montes*, after all, employed staff, just as charitable organizations of any scale do today, and these staff had to be paid. Yet the task of mounting a principled natural-law defense of the *montes*' interest charges was fraught with difficulty. Noonan notes that Navarrus, the first Scholastic who attempted the task, argued that a

168 The eighteenth-century Jesuit Francis Zech was the first to defend this practice (Noonan, *Scholastic Analysis*, 291).

169 See note 29 above.

170 Noonan discusses the history of the *montes* (which did not exist in Aquinas's time) and of theological arguments regarding their operations in chapter 15 of *Scholastic Analysis*, upon which the rest of the present discussion draws. Nicola Lorenzo Barile provides a review of more recent scholarship on the *montes* in "Renaissance Monti di Pietà in Modern Scholarship: Themes, Studies, and Historiographic Trends," *Renaissance and Reformation* 35, no. 3 (2012): 85–114.

mons could licitly charge for its self-incurred "obligation to lend."[171] Yet to charge for this obligation in addition to demanding the repayment of the lent money seems indistinguishable from usury. Noonan argues that Navarrus was "exploiting an old inconsistency" in the classic Scholastic analysis of usury. This (alleged) "inconsistency" stemmed from the early Scholastics' admission that "the mere obligation to loan should be considered to be estimable in money."[172] (The context for this admission was their consideration of the question whether a lender could demand, as a condition of lending, that his debtor later lend to him in return, which question they answered in the negative.) This admission, Noonan suggests, was inconsistent with their insistence that the act of lending itself should be "considered to be worth nothing." Here, it seems to me, a distinction is necessary. As we have seen, Aquinas is prepared to speak of the money-lender "selling" money. (He does so, in fact, in the passage that Noonan cites as evidence that he accepts that the obligation to loan is "estimable in money."[173]) A loan, then, can be said to have a "price"—that is, the equivalent of the amount loaned. The act of lending itself can also be said to have this price, and Aquinas sometimes treats the amount given at the loan's maturity as payment for the act of lending.[174] In one way, then, the act of lending certainly is worth something. In another way, of course, it is indeed "worth nothing," because it is worth nothing over and above the money lent. Since, in one way, the act of lending *is* worth something, there need be no inconsistency in Aquinas's admission that the obligation to lend is likewise worth something.[175] However, he would surely *not* admit that this obligation is worth anything over and above the amount lent in actually discharging this obligation, which is what Navarrus claimed.[176] In

171 Noonan, *Scholastic Analysis*, 302.

172 This admission, according to Noonan, is first made by William of Auxerre, and subsequently became standard among the scholastics (including Aquinas); see *Scholastic Analysis*, 302nn25–27.

173 Aquinas, *ST*, II-II, q. 78, a. 2, ad 4.

174 In *ST*, II-II, q. 78, a. 1, ad 5, he says that a lender "may accept repayment *for what he has done* [*eius quod fecit*]" and that he is repaid justly if he is given "as much as he lent."

175 This interpretation is, I admit, somewhat speculative. It seems to me the only way to make sense of what Aquinas says without charging him with grave inconsistency.

176 In the immediately preceding reply (ad 3), Aquinas has seemingly intimated that, quite generally, an "obligation," unlike a "favor," can be "priced at a money value." According to Toon van Houdt, this thesis was accepted by most of the late Scholastic theologians ("'Lack of money': A Reappraisal of Lessius's Contribution to the Scholastic Analysis of Money-lending and Interest-taking," *The European Jour-*

speaking of an "old inconsistency" in the classic usury analysis, Noonan seems (indirectly and implicitly) to acknowledge that Navarrus's suggestion amounts to an abandonment of the usury prohibition.

The suggestion that a lender or lending institution can charge for the obligation to lend would recur in defenses of non-charitable deposit banking. Noonan goes so far as to say that "the fundamental defense of the banks is their right to charge for their obligation to lend."[177] Since, on the face of it, this defense rests on an abandonment of the usury prohibition, it is worth considering it briefly. The "obligation" for which the later Scholastics would claim banks had the right to charge is, specifically, the obligation incurred when a bank engages in credit creation.[178] Noonan also calls this "the obligation of being *ready* to lend."[179] Credit creation is arguably morally objectionable, for reasons that are unrelated to the usury prohibition and that I will touch on later. For present purposes, it is sufficient to remark that payment for readiness to lend may be perfectly licit, if it means payment for labor and costs incidental to the profession of lending. If it means something more than this, it seems no less irreconcilable with the usury prohibition than simple payment for the "obligation to lend" (if this "payment" is not the mere repayment of the loan).

If the *montes* could not charge interest on the basis of their obligation to lend, on what basis could they do so? To charge for their lending as such would have been usurious. On the other hand, charges for costs incidental to lending (including employees' salaries) could not be relied upon to cover these costs. To make matters worse, charitable donations proved insuffi-

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nal of the History of Economic Thought 5, no. 1 [1998]: 1–35, at 6). Houdt claims that these theologians also accepted the liceity of a suretyship bond, by which a guarantor promised to repay a defaulting borrower's debt and recover his money from the borrower later, in return for a fee. But this fee amounted to payment for incurring the (conditional) obligation to lend, since the money spent on repaying the debt was, in effect, a loan to the defaulting debtor. This seems a clear instance of an obligation to lend having a price over and above the "price" of the loan itself. It is likely that Aquinas would have disagreed with these Scholastics about the right of guarantors to charge a fee for their service. Noonan notes that, while the early Scholastics accepted without qualm that a guarantor could charge for costs incurred in paying a defaulter's debt, the suggestion that he could charge simply for incurring the obligation to do so was not made until 1400, and was swiftly repudiated by both St. Bernadine and St. Antoninus (*Scholastic Analysis*, 204). It would certainly seem that allowing such a charge would undermine the usury prohibition.

177 Noonan, *Scholastic Analysis*, 338.

178 Noonan, *Scholastic Analysis*, 336–38.

179 Noonan, *Scholastic Analysis*, 404n22 (emphasis mine).

cient even for the loans to the poor that the *montes* were erected to provide, let alone for the associated incidental costs. The *montes* were consequently forced to accept deposits on which they paid moderate interest, a practice justified on the grounds that the depositors suffered *lucrum cessans* by lending money to the *montes* instead of investing it.[180] This interest was an additional "incidental expense" of lending, which could consequently be charged to the *montes*' customers. In the course of time, many *montes* began lending at interest to wealthy businessmen, at a rate significantly higher than that at which they themselves paid interest to depositors.

The history of the *montes* illustrates the grave difficulties in erecting a purely charitable ("not-for-profit") lending institution that will be economically viable.[181] When such an institution is driven to lend to wealthy businessmen at relatively high rates of interest, its operations are no longer purely charitable. What just title could it have to this interest? The mere fact that it will use the interest to cover the costs of making loans to the poor does not clear it of usury. (It is not normally just to steal from the rich, even to give to the poor.) Since the businessmen would invest the money they borrow and, let us assume, make a profit, it could be argued that the relevant loan contracts are virtually equivalent to triple contracts. As we shall see in the following section, the later Scholastics held that a loan at interest virtually equivalent to a licit transaction would not violate the usury prohibition, if made in good faith. The institution's non-charitable lending at interest could then be justified, and the interest used to fund charitable loans and operating expenses. But it is important to note that, in that case, the institution could *not* factor a risk premium into its interest charges on investment loans. The loan contracts, *ex hypothesi*, must be treated as virtually equivalent to triple contracts, and the defining feature of a triple contract is that the investor's capital and profit are both insured. (Someone negotiating an *actual* triple contract would surely act unjustly if he charged his partner a premium for the risk that the contract obliges the partner himself to bear!) It would follow that the institution could charge risk premiums only (if at all) on its charitable loans.

I have argued that the putative interest title "risk" is most plausible

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180 See Noonan, *Scholastic Analysis*, 303. For obvious reasons, the popes who approved the practice were anxious to prevent its usurious abuse. According to Noonan, the strict rules they laid down to this end were not kept.

181 Noonan may overestimate the extent to which the *montes* were in fact "purely charitable" even at their inception. According to Barile, contemporary scholars tend to believe that the *montes* were "a hybrid of charitable institution and bank from the very beginning" ("Renaissance Monti," 100).

in the case of loans made by a habitual lender or lending institution. If, however, habitual lenders or lending institutions can charge risk premiums only (if at all) on charitable loans, the risk title would be, at best, of limited practical significance.

Aquinas and *Lucrum Cessans*

Noonan's critique of Aquinas's major natural-law argument against usury, I have sought to show, is unsuccessful. The argument is internally consistent, compatible with Aquinas's just-price theory, and in no way dependent on the dubious theses of the "sterility" and "non-vendibility" of money. I must now, finally, consider the question of whether the usury prohibition has nonetheless become all but irrelevant under advanced capitalism. Are the extrinsic interest titles of *damnum emergens* and *lucrum cessans* virtually always present in contemporary loans, as Noonan and others argue?

In order to answer this question, we must firstly consider Aquinas's own treatment of these titles. He seems to recognize some form of the interest title *damnum emergens*, since he says that someone who, through lending, accidentally incurs a loss of something he "ought to have" may justly demand that his debtor compensate him for this loss. However, he gives no illustration of the kind of "loss" he has in mind. He seems to reject *lucrum cessans*, since he immediately adds that a lender "cannot enter an agreement for compensation, through the fact that he makes no profit out of his money," because "he must not sell that which he has not yet and may be prevented in many ways from having."[182] In *De malo*, he says that a lender may justly claim compensation *only* for loss due to late repayment. Regarding other losses, he says that "the lender ought to have taken precautions" and that the borrower has no obligation to compensate the lender for losses incurred through his own "stupidity."[183]

The apparent tension between the treatments of *damnum emergens* in the *Summa* and in *De malo* suggests that, if we seek a consistent development of Thomist principles bearing on interest titles, we must be prepared to set aside some of Aquinas's own conclusions. He holds, reasonably, that a lender cannot justly claim compensation for loss due to sheer foolishness. A lender also cannot justly claim compensation for the loss of something that he "has not yet and may be prevented in many ways from having." The key expression here seems to be "in many ways" (*multipliciter*). As Christopher Kaczor remarks, while in Aquinas's day, "the growth of an investment would be highly speculative," under modern capitalist conditions it may

182 Aquinas, *ST* II-II, q. 78, a. 2, ad 1.
183 Aquinas, *De malo*, q. 13, a. 4, ad 14.

be "virtually assured."[184] Since Aquinas also holds that a lender can justly claim compensation for the loss of something he "ought to have," might he not reasonably allow that someone who forgoes an investment opportunity whose profitability was "virtually assured" in order to lend out of charity can justly demand compensation for *lucrum cessans*? This, of course, was the eventual consensus view of the later Scholastics. Finnis argues at some length that Aquinas's "principles of justice in relation to . . . recompense" should at any rate have led him to allow compensation for *lucrum cessans*, with the proviso that "any charge made for loss of profit from available alternative investment . . . of the funds loaned ought to be *discounted* to allow for the multiple uncertainties involved in such investment."[185]

The implications of admitting *lucrum cessans* are, in Finnis's view, far-reaching. Under modern capitalism, he says elsewhere, "the nature of money changes."[186] In addition to being a medium of exchange, "it becomes at least equally capital, a means of sharing in the risks and rewards of productive enterprise in a non-stationary (non-equilibrium) economy." It would seem to follow that, in principle, *any* lender might justly demand compensation for *lucrum cessans*, since he is really lending capital, though Finnis does not explicitly draw this conclusion.[187] Certainly, he seems to accept the liceity of contemporary commercial practice quite generally. While he insists that "in all historical circumstances" it is "wrong to charge interest on a loan in virtue of the very making of the loan," he evinces no

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184 Christopher Kaczor, "Moral Theology, Development of Doctrine, and Human Experience," *Josephinum Journal of Theology* 10, no. 2 (2003): 194–209, at 204.

185 Finnis, *Aquinas*, 209 (emphasis original). The full argument runs from 207–9. He goes so far as to say that Aquinas not only should have said this, but "perhaps did mean" it, even though he does not expressly say so in the *Summa*. Finnis does not seek to reconcile this bold interpretation with Aquinas's categorical rejection in *De malo* of compensation for any loss not due to late repayment, though he alludes to the relevant passage (205n115).

186 John Finnis, "Historical Consciousness and Theological Foundations," in *Religion and Public Reasons: Collected Essays*, vol. 5 (Oxford: Oxford University Press, 2011), 139–62, at 157. This was originally Finnis's 1992 Gilson Lecture.

187 In *Aquinas*, Finnis argues specifically for the liceity of trading bonds, on the grounds that the market rate of interest on them reflects what the bondholders "are reasonably presumed to have lost" by investing in bonds rather than shares (207). In effect, a bondholder is in a position comparable to that of the investing party to a triple contract, though Finnis does not put it this way. His purpose in doing so is perhaps to underscore the fact that, under modern conditions, even what appears to be a case of naked profit-seeking on a loan can be justified (by appeal to *lucrum cessans*). Moreover, the market rate of interest on the kind of loan in question can be assumed to be just.

concern at the pervasiveness of lending at interest in the contemporary world. Presumably this is because he agrees with Prümmer that there are today "nearly always some extrinsic titles to justify the taking of reasonable interest for money lent." He would then have little reason to dispute Noonan's statement that, "in terms of emphasis, of perspective, of practice, the old usury rule has disappeared: the just title to profit is assumed to exist." He would likely stress that the interest taken must be "reasonable," and he might fault Noonan for seemingly disregarding the still widespread practice of charging *unreasonable* (excessive) interest, especially on consumption loans.[188] Nonetheless, he would accept Noonan's main contention that, under modern economic conditions, charging interest *as such* has in practice ceased to be sinful, since it is always safe to assume the presence of a just title to (reasonable) interest.

It could be objected that, even if a just title is present, the lender may be unaware or heedless of the fact. How many bondholders realize that the returns on their bonds can be viewed as compensation for foregone profit? Of those who do, how many take comfort in the thought that this exculpates them from usury? If it is a sin to seek gain in lending, it would seem that a person sins who lends profitably without knowing or caring that there exists some just extrinsic title to his profit. As Noonan documents in chapter 13 of his study, from the sixteenth century onwards an increasing number of theologians held that, absent positive evidence to the contrary, a man who seeks profit should be supposed to have an "implicit intention" to do so honestly. These theologians also held that an "implicit (just) title" to interest might be present in contracts indistinguishable on their face from usurious loans. If a man lends profitably but this transaction can be shown, on analysis, to be virtually equivalent to some non-usurious transaction—as purchasing bonds is, arguably, virtually equivalent to making a triple contract—then his implicit intention to profit honestly suffices to clear him of wrongdoing, even if he is ignorant of this virtual equivalence. This development, Noonan observes, was "absolutely necessary" if large swathes of modern commercial activity were not to violate the usury prohibition.[189]

The notions of "implicit intention" and "implicit contract" and their

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188 As we have seen, the charging of excessive interest is the principal, if not sole, target of recent papal condemnations of "usury." For a detailed discussion of contemporary "usury" (in this popular sense) from a Catholic perspective, see William M. Woodyard and Chad G. Marzen, "Is Greed Good? A Catholic Perspective on Modern Usury," *Brigham Young University Journal of Public Law* 27, no. 1 (2012): 186–228.

189 Noonan, *Scholastic Analysis*, 269.

deployment in moral theology raise a host of questions, which I will not address here. Let us assume that a majority of those who today lend at interest wish to profit honestly and, hence, have the implicit intention to profit from lending only if the contracts with their debtors are virtually equivalent to non-usurious contracts. According to Prümmer (and, it seems, according to Kaczor and Finnis as well), nearly all interest even on consumption loans can today be treated as virtually equivalent to compensation for *lucrum cessans*, since today's practically boundless scope for profitable investment means that nearly every such loan carries an opportunity cost. It would seem to follow that the vast majority of those who today profit from lending are not *ipso facto* guilty of usury. (Whether a majority of today's premiums are, to use Prümmer's word, "reasonable"—proportionate to probable foregone profit and fairly discounted to allow for uncertainty—is of course a separate question.)

Appealing as this argument is, Aquinas would almost certainly reject it. Let us for now consider only consumption loans, on the assumption that investment loans can normally be treated as virtually equivalent to triple contracts. Granted that, under modern conditions, nearly every sum of money that is lent for consumption purposes could have been invested profitably,[190] it does not follow that nearly every lender truly incurs a compensable loss. The mere abstract possibility of investing one's money profitably is an insufficient basis upon which to claim compensation for *lucrum cessans*. Firstly, not every lender is competent to make reasonable judgments about just *which* possible investments would likely be profitable. (Even experienced investors often make what turn out to be poor investment decisions.)[191] More importantly, even a lender with the requisite knowledge and experience can claim to be forgoing (likely) profit only if, before lending his money, he had *intended* to invest it. He might not have had any specific investment project in view, but he must at least have had the general intention to invest. On no other grounds could he plausibly claim that, by lending instead, he has incurred the loss of something he "ought to have." Finnis's own discussion of Aquinas's theory of loss leaves little room for doubt that this would be his view. He recognizes two kinds

190 As Storck notes, this is actually an exaggeration, since, in times of depression or recession, low profit expectations mean that businessmen will not normally spend on new investment projects (*Economics*, 124–25).

191 Individual investors suffer "systematic and economically large losses," according to Brad M. Barber, Yi-Tsung Lee, Yu-Jane Liu, and Terrance Odean, "Just How Much Do Individual Investors Lose by Trading?," *The Review of Financial Studies* 22, no. 2 (2009): 609–32, at 609.

of situation in which a person can be said to lose something he "ought to have." The first is when he is deprived of something he already actually has, as when his house is destroyed. The second is when he is "impeded or prevented" from getting what he was "on the way to having" (*in via habendi*), as when seeds he has sown are dug up before he has reaped the harvest.[192] If someone lends money that he had no prior intention of investing, he cannot possibly be said to have been "on the way to having" any investment returns and so cannot justly claim any compensation for forgone profit.

It is worth noting that the seventeenth-century Spanish Scholastics, who played a vital role in the development of the doctrines of "implicit intention" and "implicit contracts,"[193] also accepted that a lender must have intended to invest the money he lends, if he is to claim compensation for *lucrum cessans*. Lessius, Molina, and Lugo all held that the money lent must have been, in Bernard Dempsey's words, "more or less definitely set aside for business purposes, or for the purchase of a productive good."[194] This requirement is intuitively reasonable. However, by the early twentieth century, if not before, even some theologians anxious to defend the traditional principles of usury analysis were prepared to sacrifice it. In a 1903 dissertation setting forth what Noonan describes as "one of the ablest presentations of the old theory every made," the Belgian theologian Joseph Ernest Van Roey defended "the universal claiming of *lucrum cessans*" by lenders, on the grounds that "in today's economy every holder of money *can* employ it profitably, and to forego money's use in a loan gives *every* lender a right to interest."[195] The words I have italicized contain what Aquinas would surely regard as the fallacy in this reasoning. While every holder of money *can* employ it profitably, *not* every holder of money has the know-how to do so or actually intends to do so. Consequently, the right to claim compensation for *lucrum cessans* upon lending is certainly not "universal."

While the precise history of this seemingly indefensible expansion of the *lucrum cessans* title is not clear to me,[196] an important antecedent was the emergence in the seventeenth century of a closely related interest title:

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192 Finnis, *Aquinas*, 208. The discussion is based chiefly on *ST* II-II, q. 62, a. 4. The examples of the destroyed house and of the seeds dug up before harvest time are Aquinas's own.

193 Noonan, *Scholastic Analysis*, 273–77.

194 Dempsey, *Interest and Usury*, 172–73.

195 Noonan, *Scholastic Analysis*, 389. This is Noonan's paraphrase.

196 Noonan does not expressly identify any one thinker responsible for it.

"lack of money" (*carentia pecuniae*). The first Scholastic to take this title seriously was Lessius.[197] Despite accepting (as noted above) that a lender must have intended to invest his money in order to claim *lucrum cessans*, Lessius refused to condemn[198] the practice, customary at the Bourse of Antwerp, of allowing any merchant who lent money to charge for the lack of this money during the loan period, "even though there [were] no gain of his that stop[ped] because of his loan."[199] The Antwerp merchants had established a "price" for the lack of money, indexed to the average rate of profit. A merchant could charge this price when lending, even if the lending in no way interfered with his investment plans, on the grounds that "the just price of an article or obligation in any community is that which is put upon it by that community in good faith for the sake of the common good in view of all the circumstances." Lessius observed that, according to the merchants themselves, "all the exchanges of this time are unjust, if this title is not just."[200]

The argument of the Antwerp merchants, as recounted by Lessius, treats "lack of money" as "an article or obligation." Yet it is clearly neither an "article" (a vendible good) nor an "obligation" (i.e., an obligation to perform some service). It is simply a condition consequent on lending, which is often, but not always, burdensome to the lender. The very idea of establishing a "just price" for something that is not a possible object of an exchange (since it in no way serves to satisfy human *indigentia*) seems incoherent. On the other hand, it is not difficult to make sense of the merchants' customary practice. A merchant may have a general intention of investing, yet be presently uncertain what available lines of investment are safest or most profitable. If, while awaiting clearer market signals, he is asked for a consumption loan, he will reasonably demand a premium for *lucrum cessans* (indexed to the average rate of profit). It may be that subsequent market activity during the period of the loan is such that he would have refrained from investing during this period even if he had not made the loan. Nonetheless, if charging a standard premium for anticipated *lucrum cessans* has with good reason become an established practice in the mercantile community of which he is a member, he arguably does

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197 For a detailed examination of Lessius's treatment of this title and its historical background, which is intended partly to supplement Noonan's supposedly "one-sided" account in *Scholastic Analysis*, see Houdt, "'Lack of Money.'"

198 In fact, Noonan says, he is inconsistent on this point: though in one place he "formally rejects the title *carentia pecunia*," he elsewhere recognizes it as a "probable justification" for *de facto* loans at interest (*Scholastic Analysis*, 350–51).

199 Quoted in Dempsey, *Interest and Usury*, 160.

200 Quoted in Noonan, *Scholastic Analysis*, 351.

no wrong in collecting his premium anyway. (I say "arguably"; I am not convinced of this.) Some such established practice is apparently what Lessius describes, and wishes to defend. There need be no harm in dubbing the relevant interest title *carentia pecuniae*. However, it is at best imprecise to speak of the "(just) price" of *carentia pecuniae*, for reasons given above. Moreover, this way of speaking may encourage the notion that, since the mere lack of money has a price, *anyone* with money (merchant or not) has an *automatic* right to charge for it. Some of Lessius's successors apparently considered this a sound extrapolation from Lessius's principles.[201] In truth, it seems to me, *carentia pecuniae* is simply a very modest (and still questionable) extension of *lucrum cessans*. If it is a valid interest title, it is so only for members of a clearly defined community of businessmen, all of whom have at least an habitual intention of investing—as Lessius himself would have agreed.[202]

We have seen that Aquinas's principles regarding interest titles, if consistently developed along the lines suggested by Finnis, allow a lender to claim compensation for *lucrum cessans* as long as the profitability of foregone investment opportunities is "virtually assured." However, *pace* Finnis, Aquinas would deny that the right to claim compensation for *lucrum cessans* is (nearly) universal. This right is restricted to lenders who, before lending, had at least the general or habitual intention to invest the money they instead chose to lend.[203]

If this is correct, it follows that contemporary *professional* lenders normally do not have this right, at least when making consumption loans.[204] It would be absurd for someone who makes loans for a living to claim that, every time he has made a loan, he was "on the way to having" profits from some investment that he would have made but for this loan. (He might *occasionally* lend money that he had originally intended to invest—there is nothing, after all, to stop a professional lender from also being an amateur investor—and in this exceptional instance he could perhaps demand compensation for *lucrum cessans*.) The case is not fundamentally different with a professional lender who is *also* a professional investor. If he routinely devotes a certain portion of his wealth to lend-

201 Noonan, *Scholastic Analysis*, 361.

202 "[Lessius] was discussing not a general proposition but the very limited and special market of the "community of merchants" of the Antwerp Bourse" (Dempsey, *Interest and Usury*, 166).

203 This is also the view of Storck (*Economics*, 125).

204 This was the unanimous view of the early Scholastic defenders of the *lucrum cessans* title (Noonan, *Scholastic Analysis*, 131–32).

ing, with a view to making part of his living therefrom, he cannot, as a rule, licitly claim compensation for *lucrum cessans* from his debtors. (The possible exception, again, would be the rare occasion when he diverts into lending funds originally earmarked for his regular investment activities.)

It goes without saying that, if individual professional lenders do not (normally) have the right to claim compensation for *lucrum cessans*, neither do lending institutions, which are of course responsible for most contemporary lending. Moreover, there would be a serious objection to contemporary *banks* claiming compensation for *lucrum cessans*, even if one followed Van Roey in admitting the "universal" right of *individual* lenders to claim such compensation. In the fractional reserve system that prevails throughout most of the contemporary world, commercial banks are not obliged to draw on savings when lending. Most of the money lent by banks today is rather created "out of thin air," as Brian McCall bluntly puts it.[205] This arrangement is arguably objectionable in more ways than one. The simplest and most radical objection (with which, I must confess, I am inclined to agree) would be that fractional reserve banking is nothing more or less than legalized fraud.[206] Another possible objection (with which, again, I am inclined to agree) is that, since money creation leads eventually to inflation, the early recipients of newly created money tend to benefit at the expense of those—a much greater number—whose savings depreciate due to the eventual inflation. (This is an instance of what Father Dempsey somewhat imprecisely calls "institutional usury."[207]) For present

205 McCall, *Church and Usurers*, 32.

206 This seems to be Anscombe's view, to judge by her statement that modern banking is apparently founded on the "highly successful dishonesty" of late medieval goldsmiths, who practiced what we might call a primitive form of fractional reserve banking. Their receipts for deposited coins circulated as money and they made loans backed by the deposited coins, while also loaning the coins themselves ("Philosophers and Economists," 254). Interestingly, however, even the more rigorous Scholastics did not condemn early forms of fractional reserve banking. According to Noonan, before the seventeenth century the Scholastics had nothing to say about the already-existing forms of credit creation "out of thin air" (*Scholastic Analysis*, 172–73). (The *montes pietatis* did not engage in such credit creation [304], which may partly explain their endemic financial difficulties.) When Molina took note of the practice in the seventeenth century, he did not formally condemn it (338).

207 Dempsey, *Interest and Usury*, 228. Noonan finds Dempsey's analysis "suggestive and stimulating," but denies that it is an authentic development of the Scholastic analysis of usury (*Scholastic Analysis*, 406). D. Stephen Long offers a detailed and sympathetic discussion of Dempsey's thought about "institutional usury" in "Bernard Dempsey's Theological Economics: Usury, Profit and Human Fulfil-

purposes, however, we need only consider the implications of fractional reserve banking for banks' interest titles. An individual investor who occasionally makes charitable loans may claim compensation for *lucrum cessans* partly because, at any given time, he has only so much money. If he makes a charitable loan of $1,000, the amount immediately available to him for investment is $1,000 smaller than it would otherwise have been. This is not true of banks. While reserve and capital requirements place theoretical limits on the amount of money that they can create at any given time, a bank's choices are not normally constrained, at any given time, simply by the quantity of money it has, or may immediately create. If it makes a consumption loan of $1,000, it cannot claim that the amount of money immediately available to it for investment is $1,000 smaller than it otherwise would have been. McCall and Thomas Storck both argue[208] that banks in a fractional reserve system cannot plausibly defend their interest charges by appealing to *lucrum cessans*. Storck goes so far as to say that "almost all" of the interest charged on loans not based on savings "seems to be nothing but usury."

Professional lenders and lending institutions may well have extrinsic titles to interest on consumption loans, but despite what Van Roey, Prümmer, Finnis, Kaczor, and Noonan himself claim or suggest, *lucrum cessans* is not normally one of them. On Aquinas's principles, this seems indisputable. Yet it is the alleged ubiquity of *lucrum cessans* in advanced capitalist societies that, more than anything else, is supposed to justify contemporary lending at interest. Since professional lending institutions are responsible for the lion's share of this lending, it is difficult to avoid the conclusion that these institutions routinely practice usury. Though unwelcome, this conclusion is not surprising. We saw in the preceding section that, for the early Scholastics, the very idea of professional lending was deeply suspect. Since most professional lenders openly seek profit from lending, it would be mere chance if their returns were no more than they needed to cover the costs incidental to lending.[209] (The *montes*, of course, charged interest

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ment," *Theological Studies* 57 (1996): 690–706. He is apparently inclined to agree with Dempsey that "the capital which financed the modern economy violated the usury proscription because it was based either on confiscation, conquest and exploitation, or credit that had little connection with savings" (704). For a recent, sympathetic discussion of Dempsey's ideas from a non-Catholic perspective, see Betsy Jane Clary, "Institutional Usury and the Banks," *Review of Social Economy* 69, no. 4 (2011): 419–38.

208 McCall, *Church and Usurers*, 151; Storck, *Economics*, 128n51.

209 If Noonan is right that the late Scholastics' "fundamental defense" of *non*-charitable deposit banking was an appeal to the banks' supposed right to charge for their

on charitable loans only to cover such costs, and were consequently able to offer these loans at significantly lower rates than the professional money-lenders.) Granted that investment loans can generally be treated as virtually equivalent to triple contracts, and setting aside the aforementioned difficulties regarding fractional reserve banking, how many professional lenders could honestly claim that the interest they charge on consumption loans (e.g., mortgages) is reducible without remainder to compensation for incidental labor and expenses, plus a risk premium?

Conclusion: The Enduring Relevance of the Usury Prohibition

Neither in the sixteenth nor in the nineteenth century did the Church cease to teach the intrinsic sinfulness of demanding interest on the mere strength of a loan. However, it cannot be denied that, for at least the last two hundred years, the Catholic faithful have often been unclear about the teaching's application under modern economic conditions. The late sixteenth century popes' thundering denunciations of covertly usurious commercial practices gave way to the early nineteenth century Roman authorities' provisional tolerance of overt interest-taking and studied reticence about its possible theoretical justification, leading ultimately to the near silence of today's *ecclesia docens* about the prohibition itself. It is not surprising that most lay Catholics either are unaware of the prohibition or consider it outdated.

Aquinas's natural-law defense of the prohibition is the hard core of what Noonan calls "the Scholastic analysis of usury." I have argued that Noonan's criticisms of Aquinas are largely unfounded and that the great saint's major natural-law argument for the injustice of usury is essentially sound. Furthermore, a consistent development of the principles he adumbrates regarding just compensation shows that his medieval successors were right to recognize both *lucrum cessans* and *damnum emergens* as valid extrinsic interest titles.

To be sure, the application of Aquinas's usury analysis to contemporary conditions presents challenges. One reason for the Church's loss of clarity about usury in modern times is, without doubt, the sheer complexity of post-medieval commercial life. Already in the sixteenth century, it was no straightforward matter to distinguish legitimate profit from usury in the returns of exchange bankers. The dubious qualifications to the prohibition proposed by the later Scholastics and their modern successors—above all, the virtually unlimited expansion of the *lucrum cessans* title—reflect

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"obligation to lend," I have argued that this defense is, in effect, an abandonment of the usury prohibition.

well-intentioned efforts to come to terms with increasingly bewildering economic realities. Confronted today with the immense intricacies of a global financial system that, as Betsy Jane Clary remarks, "few people really understand,"[210] we may well feel that an analysis whose fundamentals were worked out in the thirteenth century cannot possibly still be relevant. Yet, as I have sought to show, Aquinas's principles are not especially difficult to apply to contemporary conditions. Moreover, if we accept these principles, we will likely be led to conclude that the usury prohibition has profound, and troubling, implications for contemporary practice, and especially for contemporary banking. At a practical level, we will naturally wish to avoid formal cooperation in practices that are likely usurious, such as working for, or investing in, a bank that makes significant profits from consumption loans. We cannot, of course, simply withdraw from the whole capitalist system. Most lay Catholics in the world's more prosperous nations will, for instance, need to take out a mortgage. Aquinas argues that, while lending at usury is sinful, borrowing at usury need not be.[211] Yet we should not be complacent about our partly unavoidable entanglements in what he would surely deem an unjust system. To whatever extent we realistically can, we should seek to minimize such entanglements. For instance, as Storck suggests, Catholics would do well to invest in, and generally to promote, credit unions instead of commercial banks.[212]

I have defended a moderately strict Thomist analysis of contemporary commercial life. I do not forget, however, that the Roman responses of the 1820s and 1830s consistently ordered preachers and confessors not to disturb the consciences of Catholics who lent at interest in good faith. With the exception of canon 1735 of the now superseded 1917 Code of Canon Law, these responses are the most recent authoritative directives regarding the usury prohibition. Their warning about "rashly usurping the part of judge" by presuming to define a question not yet defined by the Holy See is one I too must heed. *Vix Pervenit*, the last formal treatment of the usury prohibition by a pope, expressly refrained from intervening in the disputes then raging between traditionalists like Pietro Ballerini and liberals like Scipio Maffei. It would therefore be rash indeed to aver that a traditionalist, Thomist analysis of modern conditions is obligatory for Catholics today. Nonetheless, pending any future papal definitions, we are certainly free to adopt and defend such an analysis. Those who find it

210 Clary, "Institutional Usury," 422.

211 Aquinas, *ST*, II-II, q. 78, a. 4, resp.

212 Storck, *Economics*, 127–28. He observes that credit unions are the contemporary counterparts of the medieval *montes pietatis*.

persuasive will not share the equanimity of Noonan, Finnis, and others in the face of an economic system that normalizes lending for profit. N&V