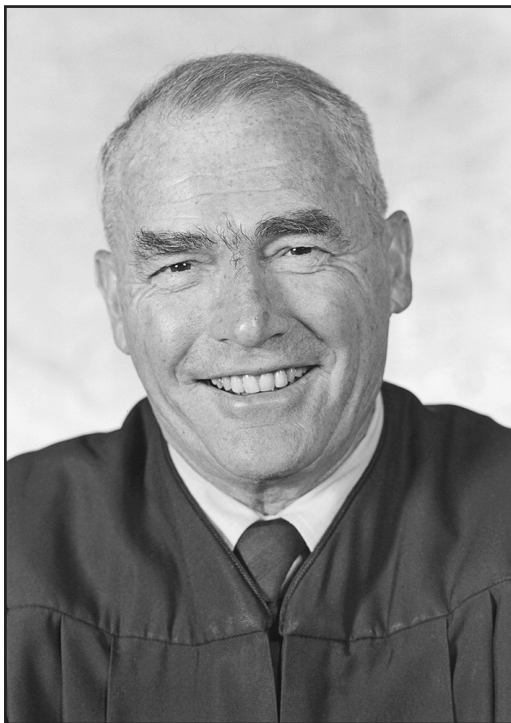
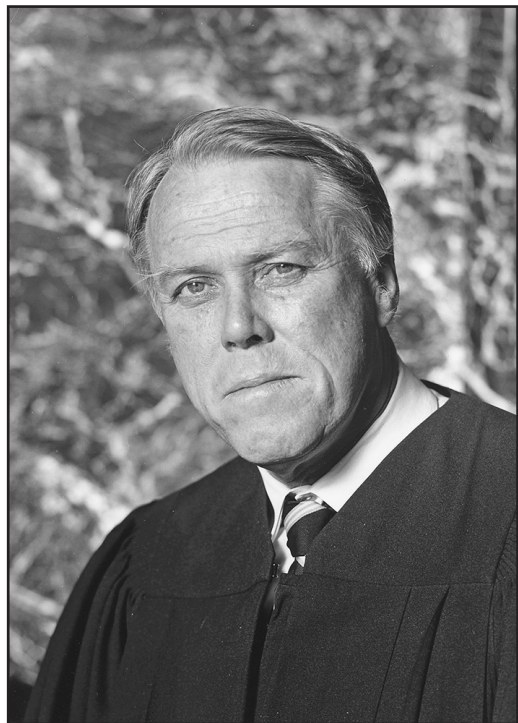




# WESTERN LEGAL HISTORY

A Publication of Ninth Judicial Circuit Historical Society

Volume 29, Number 2



**Passion and Compassion:  
The Legal Lives of  
Judge John T. Noonan, Jr.  
And  
Judge Harry Pregerson**



The Ninth Judicial Circuit Historical Society

# WESTERN LEGAL HISTORY

THE JOURNAL OF THE  
NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

PASSION AND COMPASSION:  
THE LEGAL LIVES OF  
JUDGE JOHN T. NOONAN, JR.  
AND  
JUDGE HARRY PREGERSON

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VOLUME 29

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INTRODUCTION	
Michael Daly Hawkins .....	121
JUDGE JOHN T. NOONAN, JR.	
SOME REFLECTIONS ON MY COLLEAGUE	
Diarmuid O'Scannlain .....	127
JOHN NOONAN: NO ORDINARY JUDGE	
Hon. Stephen Reinhardt .....	135
JOHN T. NOONAN, JR.: THE FAITHFUL JURIST	
Hon. Kim McLane Wardlaw .....	139
FOR JUDGE NOONAN:	
Hon. Brian Morris .....	145
JUDGE NOONAN AS A WRITER AND PRACTICING CATHOLIC: AN INTRODUCTION	
Bernard J. Cassidy .....	149
REMEMBERING JOHN T. NOONAN, JR.	
Richard W. Painter .....	161
PASSION AND PERSONHOOD: READING JOHN NOONAN'S <i>PERSONS AND MASKS OF THE LAW</i>	
Jeff Powell .....	167
JUDGE HARRY PREGERSON: REMARKS FROM A CELEBRATION OF LIFE:	
DECEMBER 1, 2017	
REMARKS OF KATIE RODAN .....	175
REMARKS OF DEAN PREGERSON .....	181
REMARKS OF BRADLEY PREGERSON .....	187
REMARKS OF MAYOR ERIC GARCETTI .....	191
TEN THINGS WE LOVED ABOUT HP – HON. MARIA STRATTON .....	199
REMARKS OF PAUL FREESE .....	207
REMARKS OF MICHAEL FEUER .....	211
BOOK REVIEWS .....	215
MEMBERSHIPS, CONTRIBUTIONS AND GRANTS	



## Introduction

By Michael Daly Hawkins

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This issue is devoted to the lives and legacies of two extraordinary individuals who were recently lost to us: Judges John Noonan and Harry Pregerson. Both were individuals of great faith—one a devout Roman Catholic, the other an equally devout Jew. Both were deeply devoted to their respective families. Both were judges for at least three decades and sent scores of law clerks into the world with a crystal-clear understanding of what was right and what was not. Importantly, both understood that the law could not be blind to the human circumstances of those who came in contact with our system of justice.

When I first joined the court of appeals in 1994, the San Francisco courthouse was still undergoing repairs after the 1989 Loma Prieta earthquake. As the restoration of what is now the James R. Browning Courthouse neared completion, one of our colleagues asked for suggestions for inscriptions to be placed above the public entrance. Suggestions flowed in with quotations from Madison, Jefferson, Lincoln, and others. Typical among them was “Equal Justice Under Law.” Harry Pregerson suggested a different quote, one from Benito Juárez, who, when asked what kind of justice system the post-Revolutionary Mexico would have, responded: “For my friends, grace and justice; for my enemies, the law.”

I am quite sure John Noonan must have smiled at Harry Pregerson’s teasing suggestion, but the author of *Persons and Masks of the Law* would have nonetheless agreed that justice can consist of one thing to those in a position of power and quite another to everyone else, and that a critical component of judging is to recognize the difference. In that vein, consider Los Angeles City attorney Michael Feuer’s description of the *Grunfeder* case,<sup>1</sup> which, if shorn of its factual background, presented a straightforward question of law: Does payment by a third party constitute “income,” so as to terminate or reduce Social Security Disability benefits? A strict constructionist, which Harry Pregerson most certainly was not, would almost always say no without particular inquiry into the source or reason for the payments. For Harry Pregerson, the source meant everything. The payments turned out to be reparations paid by the government of Germany to victims of World War II Nazi persecution. The plaintiff was not merely a survivor of that horror; she had escaped the Warsaw ghetto when relatives nailed her inside a coffin. She was later caught and so severely mistreated as to be permanently disabled. John Noonan was not on that en banc panel and

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1. *Grunfeder v. Heckler*, 784 F.2d 503 (9th Cir. 1984).

might not have agreed with the result, but he would certainly have admired Harry Pregerson's detailed description of Felicia Grunfeder's escape.

In a 2007 case where the two judges served on the same panel, Judge Pregerson wrote a spirited dissent from the majority's decision not to allow two defendants convicted of drug offenses to be resentenced. Both had received lengthy sentences under the then-mandatory sentencing guidelines. The sentencing judge had expressed frustration at having to impose what seemed a draconian punishment, and Judge Pregerson echoed his feelings. It is worth noting here that the Supreme Court would later determine that the guidelines were not mandatory but merely advisory, and the U.S. Sentencing Commission would follow by substantially reducing recommended sentences in drug cases. Judge Noonan agreed with the majority that exceptional circumstances, within the meaning of the applicable law, had not been sufficiently shown to merit relief. A lesser inclined jurist could have simply signed on to the opinion and left it at that. But that was not John Noonan's substance or style. Instead, he wrote a lengthy concurring opinion, focusing, in part, on the humanity of his colleague's position: "The strength of Judge Pregerson's position must be acknowledged. It is humane, and humaneness is a necessary quality in humans who are judges."<sup>2</sup>

John Noonan's colleagues and former clerks provide an intimate glimpse into the judicial life and impact of a truly remarkable individual, not only by their post-clerkship careers but also by the clarity of the lessons they learned from him. Another measure of his impact comes not from someone who knew him well at all but from an interesting perspective: Duke University law professor Jefferson Powell has used *Persons and Masks of the Law* for years to teach not only law students but also sitting judges in Duke's LL.M. program. Professor Powell could have chosen any number of writings to get across the importance of the human element in the life-affecting business of lawyers and judges. He did not, and his students will not quickly forget the lessons of *Persons and Masks*. John Noonan was unafraid to criticize American icons. No less than Thomas Jefferson, who was somehow able to justify an armed rebellion to ensure liberty while defending the institution of slavery, was, as John Noonan carefully points out, blind to the mask he wore at the time.

The two jurists were in some ways quite different. John Noonan published widely, and his books often reached wider audiences. A 2002 book, *Narrowing the Nation's Power*, received praise and intensive comments in both *Publishers Weekly* and the *New York Times* for its incisive criticism of the Supreme Court's commerce clause jurisprudence. His 1977 book *The Antelope*, about the post-Civil War slave trade, a topic with which I have some

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2. *Carrington v. United States*, 503 F.3d 888, 895 (9th Cir. 2007).

familiarity,<sup>3</sup> is a spectacularly well written description of the treatment of kidnapped Africans as mere chattel in the courts of the United States of that day.

Harry Pregerson did not write books, but his dogged determination to ease the burden of those less fortunate is written all over the lives he touched. And no description of him would be complete without mentioning that, at bottom, he was a United States Marine. From the moment this twenty-one-year-old former UCLA student body president stepped onto the beach of Okinawa as a platoon commander, where he would be badly wounded and evacuated, to his last breath, Harry lived the motto drilled into every Marine who ever survived boot camp: "Leave no one behind." Harry Pregerson devoted his life to ensuring that no one, be they homeless, the victim of crime, or a fearful immigrant, was left behind.

As you read and reflect upon the following insights into these two remarkable individuals, you will understand how the lives they led will have a lasting impact on those with whom they came into contact. To quote the legendary Los Angeles Dodgers broadcaster Vin Scully on his retirement: "*Don't be sad that it's over. Smile because it happened.*" We are understandably sad at the loss of these two larger-than-life individuals, but we are equally enriched by their presence among us.

Note: After this issue went to bed, we lost Judge Stephen Reinhardt, the liberal lion of the Ninth Circuit. A forthcoming issue will feature a tribute to this remarkable individual.

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3. Michael Hawkins, *John Quincy Adams and the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics*, 25 Oklahoma City Univ. L. Rev. 1 (2000).

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**Judge John T. Noonan, Jr.**









By Diarmuid F. O'Scannlain<sup>1</sup>

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## Some Reflections on My Colleague

Judge John T. Noonan, Jr., and I were in many ways kindred spirits. We were both born, raised, and educated in East Coast Catholic communities—he in Boston, I in Queens, New York—about one decade apart from one another. We both later matriculated to and graduated from Harvard Law School (again about a decade apart). After following our own paths in the legal profession, we were both eventually appointed to the United States Court of Appeals for the Ninth Circuit by President Ronald Reagan, this time not even one year apart. And our family connections go back many years before, to the late 1950s and early 1960s, when my “Maura to be” and John’s “Mary Lee to be” worked at Harvard together, Maura in the Law School and Mary Lee in the Business School. Years later, the Noonans’ daughter Susie and our daughter Megan would attend Berkeley together.

So it is perhaps fitting that Judge Noonan and I joined the court so close in time, he in December 1985, and I—his immediate junior in seniority—in September 1986. That happy coincidence in timing gave me the special privilege of serving alongside John as his colleague on the Ninth Circuit for more than thirty years. By the time we met on the court, I was of course already well aware of John’s towering reputation as an intellectual giant. He was, even before he joined the court, a prolific and prominent scholar, law professor, and author, a historian of tremendous breadth, and a true Renaissance man. Perhaps best known for his lifelong exploration of moral theology, John tackled controversial subjects—contraception, abortion, marriage, sexuality, bribery, life and death themselves—and he did so emphatically and without equivocation. As in all his life’s endeavors, John wrote on these difficult questions with elegance and grace. Even before we

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1. The Hon. Diarmuid O'Scannlain is a United States Circuit Judge, United States Court of Appeals for the Ninth Circuit.

worked together, I had some sense of who Judge Noonan was as a thinker and as a man.

But working alongside John gave me a special view into how he thought about and decided those many difficult subjects with which he engaged. Indeed, our work on the court exposed us to questions no less varied than—and occasionally as fraught as—those that were at the heart of John's scholarly pursuits. He and I served together as judges in cases dealing with subjects as wide ranging as an individual's freedom to end his own life with the assistance of a physician,<sup>2</sup> the public's right to access photographs depicting the dead body of a former high-ranking government official,<sup>3</sup> allegations of juror tampering in the trial of a man for the murder of two California police officers,<sup>4</sup> and the august question of whether a greeting card company could sell cards depicting a caricature of professional celebrity Paris Hilton repeating her ubiquitous catchphrase "That's hot."<sup>5</sup> Reflecting on that work now, I am struck most by two central features of Judge Noonan's approach to the law: his intellectual rigor and his compassion for his fellow man.

## I

Judge Noonan was a serious thinker, and he expected those around him to be as well. Anyone who has shared a bench with him can surely recall his rigorous demands of the lawyers who appeared before us; woe to the lawyer who was insufficiently prepared for an oral argument before Judge Noonan. His demands of the lawyers who appeared in our court were not simply for show; he held himself to those same standards in all his life's work. Take, for example, his decision to spend four years (and earn two postgraduate degrees) studying Catholic thought at the Catholic University of America.<sup>6</sup> In the prologue to *The Lustre of Our Country*<sup>7</sup>—an exploration of the evolution of religious freedom in America, and my personal favorite of Judge Noonan's thirteen published books—Judge Noonan explained why he chose to continue his studies after having already received a bachelor's degree from Harvard College and spent a postgraduate year at Cambridge University:

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2. *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995).

3. *Favish v. Office of Indep. Counsel*, 217 F.3d 1168 (9th Cir. 2000).

4. *Rodriguez v. Marshall*, 125 F.3d 739 (9th Cir. 2002).

5. *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010).

6. See Kevin Starr, *Judge John T. Noonan, Jr., A Brief Biography*, 11 J. L. & Relig. 151, 159–60 (1995).

7. John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (Univ. of Cal. Press 1998).

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[The year at Cambridge] confirmed what I already felt in my bones, that Catholicism was the largest intellectual force in my life, yet I knew so little about it. I had never studied it as a subject. My religious education, except for occasional reading, had not gone beyond the high school level. It seemed to me absurd to place such confidence in what I had examined so little.<sup>8</sup>

This is simply who Judge Noonan was. He did not hide from (nor easily tolerate) what he perceived to be gaps in his own knowledge of a subject. He confronted them, directly. Here was a man who, at the age of twenty, determined that he did not know enough about the foundational religion in his life and so, in his words, “spent four years examining as best [he] could the claims and credentials of the Catholic Church.”<sup>9</sup> That is a remarkable, and a remarkably humble, approach to the world and to one’s own intuitions about it. It is surely this trait that led John to develop his abundant expertise, which landed him on the faculty at both the University of Notre Dame and the University of California at Berkeley and on Pope Paul VI’s papal commission on contraception as well. And this same approach was reflected throughout Judge Noonan’s time on our court, as he continually examined (and reexamined) his own assumptions about the law. Judge Noonan did not enter a subject lightly, and he did not engage with cases frivolously or reflexively. Judge Noonan’s characteristically thoughtful, articulate, and thorough opinions are a testament to his intellectual dedication; and true to form, it is told that he personally drafted all of them by hand.<sup>10</sup>

## II

In addition to its intellectual rigor, Judge Noonan’s work is marked by his abundant compassion for his fellow man. In his scholarship, in his approach to the law, and in his life, Judge Noonan cared most about *people*. Restoring the person to the center of legal process was Judge Noonan’s enduring mission; indeed, he dedicated an entire book to the subject, *Persons and Masks of the Law*. While acknowledging the centrality of—even the *need for*—objective rules in law, Judge Noonan also decried the “dehumanizing” effect that such legal abstractions can have. In *Persons and Masks of the Law*, he wrote:

No person itself, the law lives in persons. Rules of law are formed by human beings to shape the attitude and conduct of human

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8. *Id.* at 25.

9. *Id.* at 31.

10. See Stanley Hauerwas & Richard Church, *The Art of Description: How John Noonan Reasons*, 76 Notre Dame L. Rev. 849, 859 n.45 (2001).

beings and applied by human beings to human beings. The human beings are persons. The rules are communications uttered, comprehended, and responded to by persons. They affect attitude and conduct as communications from persons to persons. They exist as rules—not as words on paper—in the minds of persons.<sup>11</sup>

Judge Noonan complained that discussions of the law commonly “overlooked the actual people in the process,”<sup>12</sup> and that legal constructs had a tendency to “suppress[] the humanity of a [person] in the process.”<sup>13</sup> In Judge Noonan’s own work on the court, he sought to counteract these dehumanizing tendencies of the law, and he emphasized the people affected by a case or by a decision of his, even when he might disagree with the legal merits of their claims. In the words of one of his former law clerks, Judge Noonan was “a story-teller” who recounted even seemingly trivial details of a case if they helped convey the human nature of the conflict.<sup>14</sup>

I know this aspect of Judge Noonan’s jurisprudence firsthand from the many cases on which we served together. For example, I once joined Judge Noonan in an opinion which held that, under the Freedom of Information Act, the public might be entitled to view ten photos that depicted the death of Vincent Foster, former Deputy Counsel to President Clinton, but which noted that the responsible agency also had to consider how the release of such photos might impact the privacy of Foster’s surviving family members. In a case that, on the surface, might appear mired in agency procedure and statutory nuance, Judge Noonan emphasized the human, writing:

[The applicable law protects] a zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one. To violate that memory is to invade the personality of the survivor. The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor’s memory of the beloved dead.<sup>15</sup>

Likewise, Judge Noonan once joined in an opinion of mine, which held that a prison policy requiring male guards to conduct certain invasive searches on female prisoners violated the Eighth Amendment, but he wrote separately to emphasize further the personal harms caused by the policy. In a passage well fit for our current political and social climate, Judge Noonan wrote:

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11. John T. Noonan, *Persons and Masks of the Law: Cardoza, Holmes, Jefferson, and Wythe as Makers of the Masks* 4 (2d ed. Univ. of Cal. Press 2002).

12. *Id.*

13. *Id.* at 20.

14. *Art of Description*, *supra* n.9, at 863.

15. *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).

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[These] are searches of women's genitalia, breasts and buttocks by men—inspections not conducted by consent with a therapeutic purpose, but police operations carried out on persons powerless to object and not only commanded to cooperate by unbuttoning their blouses, removing their belts, taking off their shoes, and raising their legs, but searched and shoved and squeezed in those areas of their bodies that have the closest connection with their sex....That the prison officials should call these probings "pat downs"—a preposterous misdescription as Judge O'Scannlain's opinion makes clear—underlines the indifference to decency with which the prison warden has proceeded.

Is indecent treatment cruel and unusual in the sense of the Constitution? Standards of decency derive from normal conduct. The indecent is a breach of the norm, is the unusual. The indecent is not necessarily cruel, but when indecency is inflicted by men on powerless women it has the sexual character that manifests the sadistic. It is cruel.<sup>16</sup>

I am proud to have joined Judge Noonan in one of his most prominent moments on the court, and in an opinion which perhaps best exemplifies his attention to the person before him, even when he disagreed with her case: his majority opinion in 1995 holding that the United States Constitution does not compel a State to allow its citizens to invoke physician-assisted suicide to end their lives—a decision later unanimously upheld by the United States Supreme Court.<sup>17</sup> Working on that case was even more poignant when both John and I were subjected to recusal motions (because we were both known to be practicing Catholics), making the subsequent unanimous Supreme Court vindication sweeter still. Even with this politically charged and morally contentious question, Judge Noonan's opinion displayed his characteristic empathy for and deep engagement with both sides of the case. Even as he rejected the claim that the United States Constitution protects an individual's right to bring about his own death through physician-assisted suicide, Judge Noonan wrote:

No one can read the accounts of the sufferings of the deceased plaintiffs supplied by their declarations, or the accounts of the sufferings of their patients supplied by the physicians, without being moved by them. No one would inflict such sufferings on another or want them inflicted on himself; and since the horrors recounted are those that could attend the end of life anyone who

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16. *Jordan v. Gardner*, 986 F.2d 1521, 1543 (9th Cir. 1993) (en banc) (Noonan, J., concurring).

17. See *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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reads of them must be aware that they could be attendant on his own death. The desire to have a good and kind way of forestalling them is understandably evident in the declarations of the plaintiffs and in the decision of the district court.<sup>18</sup>

Those litigants failed in their effort to assert a constitutional right to end one's own life with the help of a physician. But, as disappointed as they surely were by the outcome of that decision, they can have had no doubt that the court before them understood—and cared about—the humanity and dignity of the terminally ill patients they represented. To Judge Noonan, it was important—indeed vital—that every party receive that same message, and there can be no doubt that is an effort in which he succeeded.

### III

As his opinion in *Compassion in Dying* well illustrates, even as Judge Noonan focused centrally on the actual people affected by the cases that came before him, as a federal judge he knew that his personal sense of empathy did not reign supreme. As Judge Noonan wrote in that case,

Compassion is a proper, desirable, even necessary component of judicial character; but compassion is not the most important, certainly not the sole law of human existence. Unrestrained by other virtues...it leads to catastrophe. Justice, prudence, and fortitude are necessary too. Compassion cannot be the compass of a federal judge. That compass is the Constitution of the United States. Where, as here in the case of Washington, the statute of a state comports with that compass, the validity of the statute must be upheld.<sup>19</sup>

In the prison-search case, he likewise opined that while he disagreed with the prison's policy of having male prison guards at a women's prison, he knew the court was "not asked to reform the prison system of Washington, and the Constitution does not assign [it] such a role."<sup>20</sup>

It is perhaps in this dedication to the rule of law that I find my closest kinship with Judge Noonan. While we did not agree in every case, we did agree on much, and I could not agree more with the model of judicial decision-making that Judge Noonan expressed in cases like *Compassion in Dying*. There may be no truer testament to his character as a man and as a jurist than in that opinion for our court; I will forever be proud to have been a part of it.

I will miss Judge Noonan dearly, particularly as a friend and a colleague, but also as the model of a judge humbly, sincerely, and

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18. *Compassion in Dying*, 49 F.3d at 594.

19. *Id.*

20. *Jordan*, 986 F.2d at 1545 (Noonan, J., concurring).

compassionately attempting to interpret and to apply the rule of the law fairly to every person who came before him.







*By the Honorable Stephen Reinhardt<sup>1</sup>*

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## **John Noonan: No Ordinary Judge**

A number of words have been used to describe my friend, our friend, John Noonan, most of which you have already heard today, a giant, a humanist, a moralist, an ethicist, a polymath, a word I had to look up when I first read it. He was a true intellectual, a man of learning, but more important, he was a man with a heart, a man of empathy and kindness. As he said in his speech entitled “The Heart of a Catholic Law School” quoting Samuel Johnson, “The business of human beings is kindness.” He lambasted the bureaucratic mind and he included in his speech examples of the bureaucratic mind at work even from our own court. Decisions in which a lack of empathy and humanity he believed led to the overriding of justice in the name of bureaucratic, formalistic, rigid adherence to rules. These cases in John’s view could easily have come out the other way had the judges involved only recalled that the ultimate purpose, the ultimate goals of rules and of law was to achieve justice.

In his famous book “Persons and Masks of the Law” of which you’ve heard so much today, John made it even clearer. As he put it, “Fascination with rules can lead judges to engage in conduct that they would otherwise recognize as evil.”

In short, John Noonan was not an ordinary judge. He sometimes upset some of his colleagues with his bluntness, his outspokenness, his demand that we all abide by his values, by the law as he saw it. Some had a different perception of their role as judges, surely a legitimate one, and they sometimes arrived at results of which he did not approve. But to him it wasn’t personal, he just had difficulty understanding why everyone did not

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1. The Hon. Stephen Reinhardt was a United States Circuit Judge, United States Court of Appeals for the Ninth Circuit. He passed away on March 29, 2018.

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see what to him was elementary. Yet despite those disagreements, no one could doubt that John was indeed a unique and a remarkable individual. Whatever one might think of his approach to the law, how much better off would today's judiciary be with more Judge Noonans.

I first met John when he came into his initial court meeting, and after being introduced to us delivered an impassioned lecture on the failure of both lawyers and judges to perform their functions properly and then walked out of the meeting leaving us all stunned. Nevertheless, or actually because of this I thought to myself I'm going to like this guy, and I did. We became friends and I became a fan. I often wished that I could be as outspoken as he was and as principled. Even when we disagreed very strongly, as we did in "Compassion in Dying," a case his obituaries all call his greatest opinion, and one in which one I wrote the en banc case reversing him, I made it clear I thought this was his most erroneous judicial opinion. Despite that, we remained friends. As to why the Supreme Court reversed me and affirmed him, that's another matter for another time, not for today.

I think often these days of how badly the moral values of John Noonan are needed in our nation today and wonder how over this last few months he would have expressed his total disbelief of much of what we now witness daily. I remember his respect for the Constitution and the rule of law. I remember his belief that in implementing those legal doctrines we must first and foremost be guided by the principles of morality. I think of how his respect for all the institutions on which this nation is built, including the Judiciary, must be preserved and strengthened, and of how he thought it was the primary duty of our public officials from top to bottom to provide that moral leadership.

I think also of John's dedication to social justice in the best traditions of his Catholic philosophy, of his concern for the poor, the oppressed, the disabled, and all others in need, and of his belief that it is the obligation of all of us to help them. And I remember especially his love for immigrants and refugees, and how he would, yes, even as a judge, fight to see that they are treated with the compassion and fairness that he believed that his God and our Constitution demand. In John's passing, immigrants and those seeking refuge in this great nation have lost a true friend.

Yes, we will all miss John. I will miss John; his family and his country will miss him. I am proud to have been his colleague and honored to have been his friend.







*By the Honorable Kim McLane Wardlaw<sup>1</sup>*

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### **John T. Noonan, Jr.: The Faithful Jurist**

Judge Noonan was a great man and a great judge. The loss of John was more than the loss of a colleague—it was a personal loss to me and my husband, Bill, and a tremendous loss to the many worlds John influenced and loved. John was a lifelong scholar, historian, philosopher, and theologian; a man of deep faith who had the intellect and the courage to examine institutional teachings; a judge with an abiding sense of justice; a man absolutely devoted to his family, especially Mary Lee, an amazingly accomplished person in her own right, and his three children John, Rebecca, and Suzie and their families; and finally, a good friend who cultivated his many enduring relationships. Bill and I had the good fortune to be his friends, and I am both honored and humbled to have been asked to help celebrate his life.

Bill and I knew John by reputation long before we had the privilege of getting to know him personally. Because of our mutual involvement in Catholic circles, particularly with the Los Angeles Archdiocese and the University of Notre Dame, we were often asked in reverent tones whether we knew John Noonan. At that time, to name but a few of his accomplishments, John had been engaged in politics at the federal and local levels, been a professor of law at the University of Notre Dame and Boalt Hall, published *Contraception*,<sup>2</sup> which led to his service on Pope Paul VI's commission questioning and, ultimately, leading to the softening of the Church's then-position prohibiting contraception, and written numerous other books, articles, and papers on an endless variety of subjects, including classroom

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1. The Hon. Kim McLane Wardlaw is a United States Circuit Judge, United States Court of Appeals for the Ninth Circuit.

2. John T. Noonan, Jr., *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (Harvard Univ. Press 1985).

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legal texts. However, it was not until 1998, when I was confirmed to this court, that I had the opportunity to begin a relationship that developed into a deep friendship with John, Mary Lee, and his wonderful family.

When I joined the Ninth Circuit, John had already served on the court for thirteen years and had been on senior status for two. He had already written some of his most significant opinions through which his abiding sense of justice and humanitarianism shone. Yet the court would have the benefit of his intellectual power for two more decades, an overlap with my tenure that deeply influenced my development as an appellate judge.

John and I sat together forty-one times and decided hundreds of cases. It was always a great pleasure and a learning experience to sit with John, although I have to admit that the first time I sat with him, I was more than a little terrified. How could I possibly hold my own with this revered scholar? John had written about greatness in judges a decade before, citing the four cardinal virtues of the ideal judge articulated by Aristotle in the *Ethics*: justice, temperance, prudence, and fortitude.<sup>3</sup> But John elevated one trait above the others, writing, “a judge without justice is no judge at all.”<sup>4</sup>

John had a distinct writing style—clear, forceful, and powerful. Each sentence built upon not just the past thought but the past body of his work, just as each work of authorship built upon his past scholarship as his thinking evolved and as he reached deeper layers of knowledge and insight. He was above all an educator. In *Persons and Masks of the Law*, he explained that teaching was the main activity of appellate judges, “for what else are 95 percent of their written opinions?”<sup>5</sup> And teaching was “necessarily person to person, informing and evoking.”<sup>6</sup>

His opinion in *Compassion in Dying v. Washington*,<sup>7</sup> perfectly illustrates both the strength of his style and the role of teacher he assumed. While demonstrating compassion for the plaintiffs’ suffering, he wrote that compassion “unrestrained by other virtues,” such as justice, prudence, and fortitude, leads to catastrophe, as illustrated by Fyodor Dostoyevsky’s *The Idiot*.<sup>8</sup> This is rich, deep, and thoughtful material, drawing on the breadth of his scholarship, worthy of reading for its teachings without regard to

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3. John T. Noonan, Jr., *Education, Intelligence, and Character in Judges*, 71 Minn. L. Rev. 1119, 1127–28 (1987).

4. *Id.* 1128.

5. John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* 12–13 (2d ed., Univ. of Cal. Press 2002).

6. *Id.* 13.

7. 49 F.3d 586 (9th Cir. 1995).

8. *Id.* at 594.

whether one shared the same view of the Washington statute he deemed constitutional.

John thoroughly engaged himself in the process of deciding the cases as well. In fact, Judge Noonan personally handwrote all of his opinions and memorandum dispositions on legal notepads, with no assistance from his law clerks, an unusual practice for an appellate judge.<sup>9</sup> As Kevin Starr wrote in a 1995 biographical article, “Noonan relishes the social interactions and consequent diplomacy of the appeals process, in which each judge, while functioning as an individual, renders decisions as part of a panel.”<sup>10</sup> John and I did not always begin on the same side of a case, but we almost always ended up there, having persuaded each other through the exchange of draft majority opinions and dissents.

We stood together in the face of an en banc panel disagreeing with us in an opinion John had authored. In *Pincay v. Andrews*,<sup>11</sup> a sophisticated lawyer from a national law firm who had relied entirely on a non-lawyer clerk to calculate the time for filing a notice of appeal where the government was not a party later asserted excusable neglect when he missed the deadline on the grounds that the clerk had miscalculated it. We concluded that the lawyer’s delegation of legal knowledge to a non-lawyer was not excusable. John saw injustice in the contrary result, writing, “A solo practitioner would not even be in a position to attempt this kind of delegation.”<sup>12</sup> There is only one case that I can recall in which our diplomatic efforts of persuasion failed. That it was an Anti-Terrorism and Effective Death Penalty Act of 1996 decision speaks for itself.<sup>13</sup>

John never lost sight of the centrality of the other person as he courageously navigated the tension between respect for the rules and respect for the person. He believed that “[r]ules of law are formed by human beings to shape the attitude and conduct of human beings and applied to human beings.... They exist as rules—not as words on paper—in the minds of persons.”<sup>14</sup> He believed that both “abandonment of the rules” and “neglect of persons” created monsters, in a criticism of jurists who hewed only to the rules of law, abandoning “the other virtues of humanity.”<sup>15</sup>

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9. Patrick M. Brennan, *Judge John T. Noonan, Jr.: An Introduction*, 59 Vill. L. Rev. 649, 651 (2014).

10. Kevin Starr, *Judge John T. Noonan, Jr.: A Brief Biography*, 11 J. L. & Religion 151, 175 (1995).

11. 351 F.3d 947 (9th Cir. 2003).

12. *Id.* at 951.

13. *Dermirdjian v. Gipson*, 832 F.3d 1060 (9th Cir. 2016).

14. *Persons and Masks*, *supra* note 4, 4.

15. *Id.* 18–19.



The case that symbolizes John's perspective on this is *Ramirez v. Castro*,<sup>16</sup> a 2004 decision involving California's three strikes law. Isaac Ramirez had been released from prison after serving five and a half years of a twenty-five-years-to-life sentence in a maximum-security prison. A federal judge had granted his habeas petition and ordered his release after our court struck down the three strikes law under the gross disproportionality principle of the Eighth Amendment's cruel and unusual clause. The government appealed. While its appeal was pending, the Supreme Court reversed us and reinstated the three strikes law, holding that the gross disproportionality principle applied only in the "exceedingly rare case."<sup>17</sup> For a number of reasons having to do with the specific facts of Ramirez's three nonviolent wobbler felony convictions, John and I were convinced that we were indeed facing the exceedingly rare case. For one, there were only two more severe punishments available in California—life without the possibility of parole, and death—and these were for such crimes as murder, manslaughter, and rape. But it would take a certain amount of fortitude to confirm that the Supreme Court's opening for the applicability of the disproportionality principle to the extreme case really existed.

We heard the case in Pasadena in July 2003. In November of that year, the opinion had yet to be written, and John and I were again sitting together, this time in Seattle. After court one day, he searched me out in my visiting chambers and wanted to hash through all the reasons Ramirez's case was exceedingly rare. He then said, "If you can write it, I'll join you." I may have actually authored the opinion, but it was John's courage and sense of justice that gave me, still a relatively junior judge, the fortitude to do so. John had aptly written about great judges, "Here, as normally in a judge's life, courage is the crowning virtue."<sup>18</sup> His words inspired me to try to follow in his path. I was amazed to discover that the issues emanating from *Rodriguez* were also still on John's mind in 2017; John left an unfinished project on the disproportionality principle when he passed.

A different aspect of John's humanity, about which Kevin Starr has written, was demonstrated by how much John relished his social interactions with his colleagues.<sup>19</sup> Whenever he came to Pasadena, he would bring Mary Lee and stay at the Athenaeum at Cal Tech—about a block from our home. We would take turns dining very formally at the Athenaeum—cocktails and hors d'oeuvres first in the anteroom—and then move into the Athenaeum's dining room, or we would dine at our home or at a Pasadena

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16. 365 F.3d 755 (9th Cir. 2004).

17. See *Lockyer v. Andrade*, 538 U.S. 63, 64 (2003) (citing *Harmelin v. Michigan*, 501 U.S. 957, 1101 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

18. *Character in Judges*, *supra* note 2, 1133.

19. *A Brief Biography*, *supra* note 9, 175–76.

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restaurant. We exchanged ideas, stories, and news of our families, and we discussed politics and the Church. We did not always agree on politics, the Church, or the Church's politics, but we were able to discuss these differences with respect for each other's views; a respect for the other that is fast—and unfortunately—disappearing from our national dialogue.

More recently, though he continued to sit, John did not travel as much to Pasadena. Whenever I was in San Francisco, however, John would take me to his favorite restaurant near the court, Fringale, a French Basque bistro, where we would continue our conversations. The very last time we were there, we saw Bernie Sanders and his makeshift entourage ducking into a coffee shop, and that set us up for a lively political discussion. Needless to say, neither of us was “feeling the Bern.” But John told me about his running for election and winning the chairmanship on Boston's Brookline Redevelopment Authority—which was local politics at its grittiest. He defeated Michael Dukakis, among others, and discovered the most difficult battles were against unscrupulous developers. This experience was on his mind when he wrote his 1984 book, *Bribes*,<sup>20</sup> one of his most highly regarded and internationally translated publications.

In March 2009, our son Billy was a freshman at the University of Notre Dame when university president John Jenkins invited the President of the United States to speak at commencement and receive an honorary degree. The university and Father Jenkins were widely denounced in the crudest of terms, as was President Obama; protests with graphic images of fetuses broke out on campus; immense pressure was brought on Father Jenkins to rescind the invitation. We received almost daily calls from Billy describing the ugliness of the protests and the barrage of flyers opposing the President he had voted for. He questioned how to reconcile his Catholic faith, his love of Notre Dame, and his support for President Obama. When John spoke at the 2009 commencement, after Mary Ann Glendon rejected Notre Dame's highest award and dropped out over President Obama's participation, he answered Billy's questions perfectly.

John's commencement speech evoked many of the teachings in his 2005 book, *A Church That Can and Cannot Change*.<sup>21</sup> He told us that the matter was one of conflicting consciences, and the answer was not to hurt your friends, but “prayer, patience, empathy, and the love that encircles the other person...” John touched countless human beings when he said, “One friend is not here today [Mary Ann Glendon], whose absence I regret.... At the same time, I am here to confirm that all consciences are not the same; that we can recognize great goodness in our nation's President without defending all of

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20. John T. Noonan, Jr., *Bribes* (Macmillan 1984).

21. John T. Noonan, Jr., *A Church That Can and Cannot Change* (Univ. of Notre Dame Press 2005).

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his multitudinous decisions; and that we can rejoice on this wholly happy occasion.”<sup>22</sup>

With this speech, John courageously stepped into a national moral divide, gave comfort to both sides, silenced the anger and the hurt, and created room for the love and celebration that commencement day should bring. What he fundamentally believed about the Catholic Church, was that “on the surface contradictions appear. At the deepest level the course is clear.”<sup>23</sup> So with deepening understanding, the Church’s traditions could change over time, but “what is vital will survive as the ephemeral is discarded.”<sup>24</sup> That we are so privileged to have a Pope Francis demonstrates just how prescient John was.

John’s vast body of scholarship and legal decisions reveal a man of many dimensions, not to be defined only by his Catholicism. He examined every aspect of moral and judicial thinking and answered the thorny questions that arose over his thirty-one years as a Ninth Circuit judge. He sat on numerous cases potentially implicating religious issues, but one could not predict on the basis of his religion alone where he would come out. Answering the question whether a justice’s religion affects constitutional decision-making, he did a historical analysis and concluded that “religion is sometimes relevant as one strand in a judge’s mind. Religion, however, does not regularly predict how a judge will vote on a constitutional question.”<sup>25</sup> This flows both from the complexity of evolving religious belief and the more important significance of “the judge’s experience of life” and, in John’s mind, because judges “suffer little supervision...their only effective supervisor is their conscience, reminding them that what they do has an impact on the lives of the other human beings.”<sup>26</sup>

John was a wise and faithful jurist who listened to his conscience and led a life devoted to his family, God, scholarship, and the judiciary. He has left us a remarkable legacy. We will miss him, but the lessons he taught us and his love and friendship will endure.

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22. Judge John T. Noonan, Jr., Commencement Speech at the University of Notre Dame Graduation (May 17, 2009).

23. *Church*, *supra* note 20, 222.

24. *Id.* 221.

25. John T. Noonan, Jr., *The Religion of the Justice: Does It Affect Constitutional Decision Making?*, 42 Tulsa L. Rev. 761, 768 (2007).

26. See *id.* 769.



*By the Honorable Brian Morris*

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## **For Judge Noonan**

My clerkship with Judge Noonan started in a dingy office building on Market Street in San Francisco in August of 1992. The Ninth Circuit's courthouse on 7th Street remained uninhabitable after the 1989 Loma Prieta earthquake. The mood brightened when the chambers soon moved to temporary space at the new Rincon Center in downtown San Francisco. There each day at work provided a potential seminar on legal, moral, or political issues. No conversation with Judge Noonan lagged. No day lacked excitement. And no day failed to offer a chance to learn.

Judge Noonan had suffered a heart attack in 1991. I worried that he would cut back on his workload, or perhaps be diminished physically or mentally. My fears proved unfounded. He regularly summoned me for walks along the San Francisco waterfront. The walks provided exercise for his still-recovering heart and a chance for him to burn off the extra calories from his stops for pastries at the bakery in the courtyard of the building.

More importantly, the walks provided time for extended conversations with Judge Noonan. The topics might include cases on which I was working, his early career hunting communists in the federal government while working for the National Security Council, or the development of some obscure tenet of canon law. I mostly listened and asked questions that I hoped would prompt longer expositions from him.

My first round of bench memos included analysis of an Arizona statute designed to provide expanded bankruptcy protection to developers of commercial real estate. I struggled to analyze the district court's interpretation of the relevant statutory language. I argued that the district court had misapplied the law. I lacked the self-confidence, however, to complete the task. I flinched in the recommendation portion of the memo and suggested that Judge Noonan affirm the decision of the district court based on the standard of review.

Judge Noonan returned to my office with the memo. He agreed with everything until the recommendation. Why hadn't I followed through and recommended reversal? He brushed aside my doubts and urged me to advocate for what I thought the right outcome should be.

I like to think that I slowly gained Judge Noonan's confidence in my judgment. More likely he simply needed another set of eyes to provide feedback on the stacks of articles that he was drafting. He occasionally would shove into my hands something that he was writing. I would knock on his door later to provide my feedback. Judge Noonan would listen carefully to my comments, quiz me on some issues, and occasionally incorporate a few of my suggestions.

During my clerkship, the *Stanford Law Review* published Judge Noonan's account of California's execution of Robert Alton Harris and his failed efforts to stop it.<sup>1</sup> I read draft after draft, trying to absorb Judge Noonan's compelling narrative and his elegant style. Judge Noonan returned repeatedly to California's focus on Harris's act of eating his victims' fast-food hamburgers after his brutal murder of two teen-age boys. California raised this "curlicue" during the sentencing phase of the proceeding and the subsequent appeals and postconviction petitions in an attempt to dehumanize Harris. The hamburgers represented the murdered boys, and Harris a cannibal who had the "stomach" to eat the unfinished food.

One morning, Judge Noonan lent me a dog-eared copy of *Persons and Masks of the Law*,<sup>2</sup> his masterful portrayal of famous lawyers who revealed themselves to be mere mortals. It grabbed me like no other book on the law ever had. The book raises profound questions regarding the role of lawyers in society. Thomas Jefferson gave voice to stirring and enduring sentiments in the Declaration of Independence, but Jefferson owned slaves and actively protected this despicable institution. Oliver Wendell Holmes stands as the overlord of American law. However, Holmes famously ignored the backdrop of rampant corruption and United Fruit Company's domination of Costa Rica's government when resolving United Fruit Company's dispute with American Banana Company. Benjamin Cardozo developed tort law in American jurisprudence to expand redress for injured parties. How could Cardozo deny recovery to the blameless Mrs. Palsgraf for her injuries suffered on the platform of Long Island Railroad based on a lack of foreseeability?

I discussed these issues with Judge Noonan. He provided no easy or pat answers. Instead, he would shrug his shoulders and urge me to consider these men (and they are all men) in the context of the times in which they

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1. *Horses of the Night: Harris v. Vasquez*, 45 Stan. L. Rev. 1011 (April 1993).

2. John. T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Mask* (2d ed. Univ. of Cal. Press 2002).

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lived. How did they stack up against their peers? How would history judge them? What would I have done? I had to have my own copy.

In those days, of course, we lacked access to the internet to track down available copies of books. I am quite certain that I violated a number of copyright laws, but I pressed ahead nevertheless, photocopying the entire book—chapter by chapter—for a week after work. I found the photocopy recently as I searched my paper files for materials for this remembrance.

Judge Noonan provided access to other judges. He would regularly invite his colleagues on a panel to eat lunch with us. We argued with Judge Canby one day over sandwiches about whether President Clinton needed to take more aggressive steps to confront Serbian aggression in Bosnia. We discussed with Judge Boochever the life of a lawyer in Alaska—it was much like I expected life to be for a lawyer in Montana. Judge Noonan invited Judge Browning, like me a Montana native, to join us for dinner at the faculty club at Cal Tech in Pasadena, where Judge Noonan regularly stayed during court sittings. These encounters allowed me to view these judges as people with ideas and opinions, not so different from me with my ideas and opinions. Maybe I too could become a federal judge from Montana someday?

Sometimes the small acts left the biggest impressions. Once when Judge Noonan presided over a panel in San Francisco, a pro se litigant argued one of the cases. There was a ten-minute argument for each side. The litigant had formerly been employed by a taxi company as a driver. Uber and Lyft did not exist in 1992; their founders had probably not even been born yet. But even in the early 1990s, businesses still sought an economic advantage wherever they could get one.

The taxi company had changed business models and now classified the driver as an independent contractor. The driver had to rent the cab from the company for each shift and attempt to recoup the rental cost and earn some income on top. I do not recall exactly the nature of the man's claim. I do recall Judge Noonan's treatment of the man.

The panel listened to the arguments and posed an occasional question. The red light flashed to indicate that the man's time had expired. Typically, the presiding judge would cut off argument as soon as the light flashed. Judge Noonan did not. He allowed the man to argue for another fifteen minutes, until he had completed his presentation. When we returned to his chambers, I asked Judge Noonan why he had done this

He explained that the extra time did not amount to much inconvenience to any members of the court. They had to be there anyway. But the extra time more likely meant something to the taxi driver. It gave him the chance to present all of his arguments to the judges, to be heard fully, and to have his day in court. I have never forgotten this. I try to apply this lesson in my own work. I try to give all parties before me, especially those appearing pro se, the chance to be heard. Every one of us, whether we are asserting a multimillion-dollar patent claim, defending ourselves against

federal criminal charges, or simply trying to protect what little we have, deserve to have our day in court.

My brief association with Judge Noonan has always served as a source of pride. I'm most fond of Judge Noonan's dissent from the Ninth Circuit's decision to uphold the convictions of a group of young men from a poor neighborhood in Phoenix, Arizona, who had been recruited by a shady confidential informant. Similar to his humane treatment of the pro se taxi driver, Judge Noonan once again sided with the little guy. He decried the government tactics in using the shady confidential informant to recruit the young men to rob a drug stash house. He concluded that the executive branch's refusal to disavow the conduct rendered it "the duty of the judicial branch" to refuse to accept these actions as legitimate elements of a federal criminal prosecution.<sup>3</sup> Judge Noonan never shirked from that duty.

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3. *United States v. Black*, 733 F.3d 294, 318 (9th Cir. 2013) (Noonan, J., dissenting).

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By Bernard J. Cassidy<sup>1</sup>

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### Judge Noonan as a Writer and Practicing Catholic: An Introduction<sup>2</sup>

It's not every day that a *New York Times* obituary describes a Reagan-appointed federal judge as "a polymath who defied ideological pigeonholing on profound issues." Though Judge Noonan defied, he was neither a rebel nor a maverick—he took pains to observe great respect for the legitimate authority of precedent while searching on a case-by-case basis for how to best apply the heart of the law to the persons and facts at hand. That some Noonan opinions surprisingly defied then-established ideological categories simply reflects how impoverished and calcified those ideologies had become.

Although it may be too soon to assess the impact Noonan the polymath has had on the development of American law, it is worthwhile to consider memorializing Noonan, who spent two and a half formative years at Harvard College as an English major before graduating summa cum laude at age nineteen, simply as a writer. Noonan's prose can be arresting and sometimes unforgettable. In addition, some consideration must be given to Noonan's Catholicism. Appointed as an expert advisor to the papal commission on birth control, he was no bystander but an active participant in the tumult of the Catholic Church in his lifetime. Noonan was and remains a historically important contributor to the Catholic Church's self-

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1. Bernard J. "Barney" Cassidy, currently an Adjunct Professor at the Seattle University School of Law, graduated from Harvard Law School in 1988, where he was an editor of the *Harvard Law Review*.

2. An earlier version of this essay was presented during a Special Court Session in Memory of the Honorable John T. Noonan, Jr., on September 1, 2017, at the U.S. Court of Appeals for the Ninth Circuit. The author studied jurisprudence under Professor Noonan in 1984 and clerked for Judge Noonan in 1988-89.



understanding of its doctrines on usury, contraception, marriage, abortion, slavery, and religious freedom, as well as the complex question of how Catholic doctrine can develop, a stature acknowledged by his critics.<sup>3</sup>

In this essay we will review six examples of Noonan's writing (both as professor and judge), and offer some thoughts about how those samples reflect the Catholicism he practiced.

## **Identifying Judges When Rulings Are Reversed**

Near the start of my clerkship Judge Noonan tasked me with the review of a draft opinion that another circuit judge's chambers had circulated following the judges' private conference that took place after oral argument in the case. At the conference a majority of the three-judge panel agreed to reverse the lower court's ruling. The draft opinion began with the common recitals about how the case came before the court of appeals, identifying by name the district judge whose ruling would be reversed. Well before completing my review, I received the following comment from Judge Noonan: "Reversing, I would not name the District Judge"—a perhaps minor courtesy but one that would incrementally protect the public reputation of that district judge as well as the federal courts as a whole. Those privileged to work within the Ninth Circuit know that exchanges among members of the court can be pointed, even painful, as strong intellects clash in the frank, iterative, and (happily) unpublished process of developing judicial opinions. Published opinions are less strident, generally speaking, for good reason. Intramural collaboration among appellate judges is a system-level requirement for the effectiveness and good order of the court, even when divergent judicial viewpoints persist post deliberation.

In a single succinct sentence Judge Noonan taught his clerks about about a responsibility judicial officers have to uphold the law's dignity, exemplifying what many familiar with the court know was his habitual public courtesy, personal and professional, to fellow members of the judiciary.

### **The Antelope<sup>4</sup>**

Good writers know how to set a scene. In *The Antelope*, Professor Noonan does so as follows:

In the end of June 1820, in the last year of the first term of President James Monroe, a ship flying the revolutionary flag of

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3. See, e.g., Avery Cardinal Dulles, S.J., *Development or Reversal?*, First Things (October 2005) (criticizing Noonan's *A Church That Can and Cannot Change: The Development of Catholic Moral Teaching*).

4. John T. Noonan, Jr., *The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams* (Univ. of Cal. Press 1977).

José Artigas was boarded by a Treasury revenue cutter off the northern coast of Florida and discovered to have on board about 280 human beings in chains. The conduct of the slave trade was a federal crime, and it was reasonably inferred that the ship, the *Antelope*, was criminally conveying the natives of Africa for sale in a Southern market. For the next eight years they were to be the object of attention by President Monroe himself, and his successor as President, John Quincy Adams, Attorney General William Wirt, two Secretaries of the Navy, the Monroe Cabinet, the Supreme Court of the United States headed by John Marshall, both branches of Congress, a variety of other administrators, officers, and judges, and the American Colonization Society.

As the attention given to the Africans by any of these persons or institutions was sporadic, they have been, for the most part, ignored by the biographers of the men of the Silver Age of the American Republic and neglected by the historians of the three branches of American government. If mentioned at all, it is as part of a lawsuit, the case of the *Antelope*, where their status as merchandise was asserted by representatives of Spain and Portugal. Their names go unrecorded. Although their role was to suffer while their lawyers...acted for them and other lawyers acted against them, they are part of a story which touches the official conduct of Monroe, Adams, Marshall and their colleagues and the workings of the institutions they served. The story begins in Washington.<sup>5</sup>

Is the reader interested in what happens next in this narrative? Of course. It turns out that what happens is not a good story at all, although it is a good story to be told.<sup>6</sup> The American legal system failed the African captives. In fact, all three branches of the federal government, and luminaries within them, failed badly, in large part due to bribery and moral blindness. For nearly a decade, the African captives, who were mainly children, were bystanders during a legal battle. As Noonan later observed:

Under federal law the Africans were free, and President Monroe was supposed to return them to Africa. They were claimed as property by the Spanish and Portuguese consuls purporting to represent honest Spanish and Portuguese slavers from whom they had been taken by a pirate, whose effort to import them illegally into the United States should not, the consuls said, work a forfeiture on the rightful owners. In fact the Portuguese certainly, and probably the Spanish, were fronts for American

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5. *Id.* 1–2.

6. Stanley Hauerwas & Richard Church, *The Art of Description: How John Noonan Reasons*, 76 Notre Dame L. Rev. 849, 856 (2001).

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slaveowners (including Senator James De Wolfe of Rhode Island) unable themselves to appear in court without admitting criminal guilt.<sup>7</sup>

Georgia's U.S. attorney sought the captives' freedom under the 1819 Slave Trade Act in a trial before U.S. District Judge William Davies, who decided almost all the issues in favor of the purportedly rightful owners from Spain and Portugal. One week after his final order, which would grant the Spanish litigants the right to obtain \$30,000, Judge Davies resigned from the bench and joined the law practice that had represented those litigants.

When the case came before the U.S. Supreme Court in 1825, most of the district court rulings were reversed, and most of the Africans who had not already died were freed, but, shockingly to our twenty-first-century eyes, thirty-seven were deemed to be property, which, because the inevitable future disposition of the captive Africans was their sale, permitted some of the principal attorneys, who were also public officials, to be paid one way or another. After the Senate passed a private bill in 1828 to remove a legal impediment, and President John Quincy Adams signed that bill into law, the thirty-seven were sold, allowing those officials to get paid from the proceeds.

Noonan tells the tale of the *Antelope*, warts and all, to acknowledge, and to teach, that even a system with checks and balances can utterly fail if the persons empowered by the system fail through blindness or self-interest.

## **Bribes**

Professor Noonan's writing about corruption on the part of public officials, of course, culminated in the publication of *Bribes* shortly before his appointment to the U.S. Court of Appeals for the Ninth Circuit. In writing about Abscam, the FBI's sting operation in the 1970s that resulted in eight different juries convicting ninety-six different men and women, he provides a memorable contrast between two key persons within the FBI's team, Melvin Weinberg and John Good:

Personnel was an extraordinary combination of the lawbreaker and the law enforcer, of the unscrupulous and the scrupulous, of the knavish and the conscientious and the astute. Out front was a first-rate scalawag, Melvin Weinberg. According to his memoirs...he was a liar and a thief as a schoolboy, dropping out completely in the sixth grade. Later he was hired by a glass workers' union to break the windows of employers of nonunion glaziers. He cheated a cousin who befriended him with a position in his business. He swindled an insurance company. He took \$10,000 from a doctor for a promise, unfulfilled, to kill his

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7. John T. Noonan, Jr., *Bribes* 445 (Univ. of Cal. Press 1984).

wife....In 1977 he was convicted of wire fraud in violation of federal law. On probation and desirous of keeping a girlfriend out of the federal clutches, he agreed to become a confidence man for the FBI....

Weinberg was chosen by the government to be the chairman of Abdul Enterprises. With assured knowledge of human greed, with a lively sense of the prospects that entice greedy men, with abundant energy for imposing himself on his marks, he worked for almost two years at catching other criminals....He rejoiced in the swindling itself. His delight was in making men into monkeys. His joy was the greater the more sophisticated, the more astute, the more prestigious, the more powerful were his dupes. Uneducated except by the streets, he dominated those educated by colleges and honored by universities. A swindler formerly outside the law, he now swindled swindlers who had prospered in American society. A criminal, he turned lawmakers into lawbreakers like himself. Teamed with Weinberg were the law-abiding, the dutiful, the conscientious, including *a man congruously named Good*. Supervisor of the FBI office...John Good picked Weinberg for his talents and oversaw his efforts. Son of an FBI agent himself, imbued with the ethic of the Bureau, streetwise but disciplined, Good matched Weinberg's flamboyant gusto with his own intense and sober zeal.<sup>8</sup>

The phrase "a man congruously named Good" surely belongs in the *Oxford English Dictionary* as an example of how to properly use "congruously." But is it more than clever; it is revelatory of Noonan's implicit jurisprudence: the law is a human artifact, imperfect at times, knotted with ambiguity and complexity and developed through human effort that is strenuous and often acrimonious but that occurs within an adversary system that, at least in our country, is ultimately structured as a collaborative enterprise. The law's explicit rationality and evenhanded enforcement are fundamental human goods, essential both for enabling civilization itself and for channeling activity toward human progress. Importantly for Noonan the jurist, individual persons, whether they create, enforce, interpret, or apply the law, make a difference. Law per se is fundamentally good, but ultimately insufficient (and insufficiently understood) apart from the persons the law empowers. Individual virtue is a social necessity: without good people, the law can be a monster.

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8. *Id.* 605–6 (emphasis added).

**Olimpia Lazo-Majano v. INS<sup>9</sup>**

Speaking of monsters, we now turn to a 1987 opinion written by Judge Noonan concerning the treatment of a washerwoman named Olimpia Lazo-Majano, who had fled from El Salvador. Olimpia admitted deportability but applied for political asylum, which under the Immigration and Naturalization Act required the applicant to show a clear probability that her life or freedom would be threatened on account of political opinion, or that she had a well-founded fear of persecution. The case came before the Ninth Circuit after the immigration judge ruled, and the Board of Immigration Appeals affirmed, that she was ineligible for political asylum, and so was to be deported. For the court, Judge Noonan wrote:

Olimpia Lazo-Majano is a thirty-four-year-old woman. She is the mother of three children. In 1981, when she was twenty-nine, her husband left El Salvador for political reasons: he had been in the rightist paramilitary group known as ORDEN; when he quit he was wanted by the guerrillas and distrusted by the government. Olimpia had always lived in the same small town. For five years she had been working as a domestic for another woman, getting a day off every fifteen days. In the middle of April 1982, she received a telephone call from Sergeant Rene Zuniga, who had known her since childhood. He asked her to wash his clothes. Olimpia agreed.

On her day off during the next six weeks Olimpia worked for Zuniga at Zuniga's place. Zuniga then pointed out that Olimpia's husband was no longer in El Salvador and raped her. In Olimpia's words: "With a gun in his hand he made me be his."

In the following months Olimpia accepted Zuniga's domination. She continued to wash for him on her days off. She accepted taunts, threats, and beatings from him. He broke her identity card in pieces and forced her to eat the pieces. He dragged her by the hair about a public restaurant. He pummeled her face, causing a blood clot to form in one eye; she thought that she had lost the eye. Olimpia became nervous, preoccupied, and depressed, ate little, and became thin and frail. She wanted to escape her tormentor but saw no way of doing so.

Central to the situation was the fact that Zuniga was a sergeant in the Fuerza Armada, the Armed Force which is the Salvadoran military. Zuniga used his gun in forcing Olimpia to submit the first time. On another occasion Zuniga held two hand grenades against her forehead. On another occasion he

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9. *Olimpia Lazo-Majano v. Immigration & Naturalization Service*, 813 F.2d. 1432 (9th Cir. 1987).

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threatened to bomb her. When he referred to her husband, Zuniga said that if he returned Zuniga himself would cut him apart, kill both Olimpia and her husband and say that they were both subversives. Zuniga told Olimpia that it was his job to kill subversives.

Zuniga said to Olimpia that if she ever told on him he would have her tongue cut off, her nails removed one by one, her eyes pulled out, and she would then be killed. As Olimpia recalls his statement, he said: "And I can just say that you are contrary to us; subversive." When he was angry with her in the restaurant, he told a friend from the police "in front of all the other people in the restaurant" that she was a subversive and that was why her husband had left: "because she was a subversive."

Olimpia believed the Armed Force would let Zuniga carry out his threat. She believed that in 1979 a nineteen-year old boy she knew by sight had been tied, tortured and killed by the Armed Force; that in 1981 the husband of a neighbor had been taken away in a truck at night with fifteen others and killed by the Armed Force; that the Armed Force had raped "young college girls," as had Zuniga himself. In her view there was nobody in El Salvador that could stop the Armed Force from doing such things. In her experience when Zuniga was dragging her by the hair in the restaurant no one helped because where the Armed Force is concerned, "no one will get involved."

In 1982 Olimpia escaped from Zuniga, left El Salvador and illegally entered the United States. In January 1983, Olimpia was ordered to show cause why she should not be deported for entry without inspection....She admitted deportability and applied for political asylum, claiming fear of persecution by Zuniga. Her request was denied ...[and] the Board of Immigration Appeals...dismissed her appeal. It found that "the evidence attests to mistreatment of an individual, not persecution."...The Board declared as to the plight of Olimpia that it was "not unsympathetic with this deplorable situation" but "the fact remains that such strictly personal actions do not constitute persecution within the meaning of the Act."

Persecution is stamped on every page of this record. Olimpia has been singled out to be bullied, beaten, injured, raped, and enslaved. Olimpia's initial acquiescence does not alter the persecutory character of her treatment. That she continued to return to Zuniga's place after his initial attack upon her presents a pattern, all too familiar, of a victim identifying with the aggressor under conditions of terror. She lacked "sufficient ego-strength, self-confidence and willpower" to "escape or cry out for help." The persecution has been conducted

by a member of the Armed Force, a military power that exercises domination over much of El Salvador despite the staunchest efforts of the Duarte government to restrain it. Zuniga had his gun, his grenades, his bombs, his authority and his hold over Olimpia because he was a member of this powerful military group.

Uncontradicted evidence, then, pointed to both a clear probability of persecution and a well-founded fear of persecution.<sup>10</sup>

Notably, the dissent in that case stated bluntly that the court's holding was a "construct of pure fiction" and that "[q]uite simply, the majority [had] outdone Lewis Carroll in finding that male domination in such a personal relationship constitutes political persecution."<sup>11</sup>

Thirty years later, it is jarring to read a federal judge describe what happened between the sergeant and Olimpia as a "personal relationship." Today one might begin an analysis of the case by observing that the dissent's declaration is itself a public and political act revelatory of conventional, widely accepted, institutionalized, and state-enforced misogyny. With the benefit of hindsight, and in view of our society's evolving self-understanding about social structures that underpin sexuality and relationships between and among persons of the sexes, it is fair to say that today government-protected male domination is increasingly understood as a political reality that calls for criticism and reform. From my perspective, Judge Noonan was simply thirty years ahead of his time. If the case were discussed in his jurisprudence class, it is not difficult to imagine Professor Noonan prompting students to consider a thought exercise comparing the actions of Sergeant Zuniga to the multiple acts and omissions of the persons responsible for the federal legal system of the day, asking: Which of these government officials causes more harm?

### **Bette Midler v. Ford Motor Company<sup>12</sup>**

Speaking of the exploitation of women, we now consider Noonan's writing about whether Bette Midler's voice was protected under what has come to be known as a right to publicity. To fans, Bette Midler is a compelling and beloved star, an icon. To Ford Motor Company's agent Young & Rubicam, her unforgettable talent was a vehicle to be used to further car sales. In advertising Ford's Lincoln Mercury in 1985 with a series of television commercials in what the agency called "The Yuppie Campaign," the aim was to make an emotional connection with young urban

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10. *Id.* 1432–35.

11. *Id.* 1437.

12. *Bette Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

professionals, bringing back memories of when they were in college. Different popular songs of the seventies were sung on each commercial. The agency tried to get “the original people,” that is, the singers who had popularized the songs, to sing them. Failing to obtain the consent of Ms. Midler, the agency had her songs sung by a “sound-alike”—one of the Harlettes, who had extensively performed via backup vocals on tour with Bette Midler. Midler sued, in a case that eventually required the Ninth Circuit to decide whether California law protected this use of Midler’s voice. For the court, Judge Noonan wrote:

[T]he defendants here used an imitation to convey the impression that Midler was singing for them. Why did the defendants ask Midler to sing if her voice was not of value to them? Why did they studiously acquire the services of a sound-alike and instruct her to imitate Midler if Midler’s voice was not of value to them? What they sought was an attribute of Midler’s identity. Its value was what the market would have paid for Midler to have sung the commercial in person....

A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. We are all aware that a friend is at once known by a few words on the phone. At a philosophical level it has been observed that with the sound of a voice, “the other stands before me.” *A fortiori*, these observations hold true of singing, especially singing by a singer of renown. The singer manifests herself in the song. To impersonate her voice is to pirate her identity.<sup>13</sup>

No more need be said. In a few sentences, Judge Noonan crisply articulated as well as any common law judge might the reasons that California’s right of publicity statute properly applies to an individual person’s voice.

### **Harris v. Vasquez<sup>14</sup>**

At times Judge Noonan was the dissenter. In the case of Robert Alton Harris, scheduled to be executed following his conviction of two counts of murder, the Ninth Circuit was called upon to determine whether an additional hearing should be held that would delay imposition of the death sentence. The court ruled against the delay, over Judge Noonan’s dissent. He wrote:

In 1985, in *Ake v. Oklahoma*...the United States Supreme Court established a new, previously unknown right: the right of a defendant on trial for his life to have effective psychiatric

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13. *Id.* at 463.

14. *Robert Alton Harris v. Daniel Vasquez*, 913 F.2d 606 (9th Cir. 1990).

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assistance if his mental state was at issue. If the defendant was too poor to pay for such help, the state had the duty to provide it. The right and corresponding duty were created by the Supreme Court finding in the Constitution this requirement of fundamental fairness.

Most new constitutional rules are not applied retroactively. If, however, the rule enhances the accuracy of the determination of the facts and goes to fundamental fairness, the rule is applied retroactively. The *Ake* rule is of this kind.

Applying a rule retroactively is upsetting. The rule was not known at the time. The state was innocently ignorant of its duty. The defendant and his lawyer were unaware of what they could ask. Retroactive application means re-creating the earlier proceeding and asking, "What did the defendant have a right to, if the rule had been in effect?" The answer is, "A right to effective psychiatric assistance, provided by the state if the defendant was too poor to pay for it."

Harris was too poor to pay for it. He alleges he did not get it. The state says he did. No evidence has been taken. We have only allegations, declarations, affidavits, and arguments, none of them tested by cross-examination. If Harris' claim should be true, he is entitled to a new trial as to his sentence. If it should not be true, he must face execution. We must therefore take the time to let a federal district judge hear evidence and decide what the facts are. An evidentiary hearing must be held.<sup>15</sup>

Again, the simplicity and clarity of Judge Noonan's writing speaks for itself. Nonetheless, his view did not prevail. No evidentiary hearing was held, and Mr. Harris was soon executed without the process that Noonan wrote would have been appropriate in light of Harris's constitutional right under *Ake*.

## **Judging Judge Noonan as a Practicing Catholic**

A preliminary point before addressing how the selected writings described above might illuminate Judge Noonan's Catholicism: religious doctrine is to the practice of religion as sports commentary is to sports — an important and highly useful second level undertaking that is ultimately derivative of and less important than the primary activity itself. Accordingly, how a person practices her religion is more important than how she articulates teachings about it.

Catholics believe, as do members of all major religions, that there is a reckoning, some type of judgment, after death. In some religions it is a question of karma, and in others the mysterious byproduct of

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15. *Id.* at 163.(Noonan, J., dissenting).

predestination, but like many Christians Catholics believe there is a personal judgment by the living God of the actions and omissions we undertake during our lifetime. In support of this belief, Catholics look to a narrative in the twenty-fifth chapter of Matthew's gospel, set at the end of time, in which all nations are gathered before God, and people are separated as a shepherd separates the sheep from the goats—a narrative that is likely familiar to all readers of this essay. To some, God says, "Come, inherit the kingdom prepared for you from the foundation of the world; for I was hungry and you gave me food, I was thirsty and you gave me something to drink, I was a stranger and you welcomed me, I was naked and you gave me clothing, I was sick and you took care of me, I was in prison and you visited me."

Those so selected are surprised, which strikes me as a key theological point of the gospel narrative. They ask, "When was it that we saw you hungry and gave you food, or thirsty and gave you something to drink? And when was it that we saw you a stranger and welcomed you, or naked and gave you clothing? And when was it that we saw you sick or in prison and visited you?" God responds, "Truly I tell you, just as you did it to one of the least of these members of my family, you did it to me." The surprise: quotidian attention to and regard for the lowly and oppressed turns out to be a preferred path to God's embrace.

John Noonan understood and exemplified this Matthean teaching. Through the six encounters described above, in which he protected the good names of judges whose decisions are reversed; acknowledged and taught in bitter detail how the law failed enslaved Africans; recognized the uncelebrated goodness of a law enforcer; sheltered a victim of rape and systemic misogyny from deportation; protected an artist's personal gift against corporate exploitation; and insisted, albeit unsuccessfully, on due process for a convicted murderer, Judge Noonan found and applied the law and by doing so practiced his Catholic faith.





By Richard W. Painter<sup>1</sup>

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## Remembering John T. Noonan, Jr.

Over thirty years ago, in 1987, I graduated from law school in June and was married in August. I then moved to San Francisco to begin what has been the most inspiring job of my life: a one-year clerkship with Judge John T. Noonan, Jr., at the Ninth Circuit Court of Appeals.

From my experience clerking for Judge Noonan and later coauthoring three editions of a legal ethics casebook with him, I learned much about the relationship between the law and broader ethical questions of human existence. I learned that the goal in our profession should be not just to practice law ethically but to find a way, as Judge Noonan did, to combine the law with an inner sense of right and wrong. I learned from him the importance of using the law not to enrich oneself or one's clients but to make people's lives better and make the world a better place.

Before he became a judge, John Noonan had already made his mark as a scholar. He began his career at a time when traditional legal scholarship in the United States, as well as the Catholic Church's canon law, focused almost entirely on abstract doctrines. He challenged both secular law and canon law to think about the people who were affected by law in specific instances. His book *Persons and Masks of the Law*<sup>2</sup> described in detail experiences of particular individuals with the law. These included slaves affected by Virginia's cruel Colonial Era slave laws, and a woman named Mrs. Palsgraf, who was injured in an early-twentieth-century railroad accident, which became the hallmark of discussions in first-year torts

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1. Prof. Painter was a law clerk to Judge Noonan from 1987–88. He is currently the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School.

2. John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (Univ. of Cal. Press 1975).

classes, where many law students learn very little about who she was and how the accident affected her. His book *Contraception* challenged the Catholic Church's doctrine on contraception by focusing not just on the highly abstract doctrine of the Church, but on specific contraception practices over two thousand years and the actual impact contraception has on people.<sup>3</sup>

As legal academia in the 1980s and 1990s turned from traditional legal doctrine toward even more abstract theories about the law (everything from "law and economics" to "critical legal studies"), John Noonan continued to call attention to the actual impact of the law on real people. His laser focus was on facts first and then on applying law to the facts. He became a rock of integrity in the increasingly politicized waters of legal commentary. His agenda was about helping the law serve the people of our society, particularly the least advantaged, rather than serving an abstract theory or political objective.

His chance to have a more direct impact came in 1985. It is commonly thought that the Reagan White House nominated him for the Ninth Circuit because of his strong stance against abortion. I would like to think that this was only one of many factors considered in appointing this most eminently qualified man to the federal bench. Years ago, I was approached by a Republican political operative who complained about Judge Noonan's refusal to cut corners on due process in death penalty cases.<sup>4</sup> My response: "You guys wanted a pro-life judge. You got one. Are you complaining that he is too consistent?" The fact that Judge Noonan would hear more death penalty cases than abortion cases on the Ninth Circuit apparently never crossed some people's minds. The fact that his moral compass was consistent may have been overlooked as well.

One area where Judge Noonan had dramatic impact was on our thinking about immigration law. In his opinions, he exposed the shameful short-circuiting of due process for people processed in large groups in our

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3. "The meaning of theory, however, is properly understood only when one determines what conditions it responds to. Consequently, I have described the contraceptive means known to different eras, and what can be inferred as to their diffusion and employment. The theory, then, will not be viewed as an abstract logic developed without reference to existing habits. I shall set out both the practice to which doctrine responded and the steps taken to alter the practice." John T. Noonan, Jr., *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* Introduction (Harvard Univ. Press 1968).

4. See John T. Noonan, Jr., *Horses of the Night: Harris v. Vasquez*, 45 (4) Stanford Law Review 1011–25 (Apr. 1993).

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immigration courts.<sup>5</sup> He had the courage to back up these opinions with law review articles and speeches on the deficiencies of our immigration system.

Unfortunately, when it comes to human cruelty in immigration law, under President Trump we are moving in the exact opposite direction from what Judge Noonan had hoped for. It may please the current occupant of the White House to see the law separate children from a mother who came to our country without permission looking for a job to feed her family. Judge Noonan would not be pleased. He knew that God is not pleased. Judge Noonan is now in a place where righteousness prevails. We who remain behind must continue to work for a better approach to how the law treats our fellow human beings.

From Judge Noonan I also learned about the critical role of the judiciary in the rule of law. He focused on two distinct but related preconditions for fair adjudication in a democratic society: the unbiased judge and the independent judge.

Judge Noonan detested bias in judicial decision-making. His book *Bribes*<sup>6</sup>—published the year he interviewed me for a clerkship—documented the two-thousand-year history of this detestable practice. He documented the progress society has made in combating bribery as well as our regressions. Fortunately, as a federal judge, he never had to deal with the most corrupting influence on judges in many states, namely the system of campaign finance that sometimes makes judges dependent for election and reelection on parties and lawyers with cases before them. With the support of former Arizona Supreme Court justice and United States Supreme Court justice Sandra Day O'Connor, we continue to combat that problem at the state level.

Judge Noonan was also wary of bias rooted in abstract doctrines and theories about the law. He understood that unbiased judging required an informed judge. He saw the judge's job as first to find out the facts of a case, and then to apply the law to the facts. He asked clerks in his chambers to search the record for specific facts about the parties and the events that affected them. He looked well beyond selective facts presented by lawyers trying to impress the appellate court with a particular legal theory. He wanted to know all the facts. He deferred to the trial court's findings of fact in the vast majority of cases because there was support in the record for the

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5. See *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (upholding a district court decision striking down parts of an Arizona law targeting immigrants), partially affirmed in *Arizona v. United States* \_\_ US \_\_ (2012). ("For those sympathetic to immigrants to the United States, it is a challenge and a chilling foretaste of what other states might attempt." Noonan, concurring).

6. John T. Noonan, Jr., *Bribes: The Intellectual History of a Moral Idea* (Univ. of Cal. Press 1984).

trial court's findings. In the few cases where there was no such factual support for judicial findings or the trial court had not found all of the necessary facts, Judge Noonan was adamant that the case should be sent back.

Throughout his life as a scholar and a judge, Judge Noonan also stressed the importance of an independent judiciary. This means a judiciary independent of not only financial conflicts of interest and other personal conflicts but also political patrons and partisan politics in general. Judges are judges, not party members.

Judge Noonan and I address this problem in our casebook *Professional and Personal Responsibilities of the Lawyer*.<sup>7</sup> To illustrate the extreme example of a politicized judiciary, we present the detailed transcript of 1947 trials at Nuremberg of Nazi judges and prosecutors who allowed the entire judicial system to be taken over by party politics. The first step in this process had been the removal of judges who were alleged to be biased against Germans because those judges were Jews. Almost all of these Jewish judges were removed within months of Hitler being appointed chancellor of Germany.

Remembering those events alone, we should be adamant that in the United States we do not have "Jewish judges" and "Christian judges," nor "white judges" and "black judges" and "Irish American judges" and "Mexican American judges." We have judges. Our judges act like judges, and they should be respected as judges regardless of their race, religion, or national origin. We should never tolerate in any of the three branches of government—judiciary, executive, or legislative—any person who alleges that a judge is biased simply because of the judge's ethnic heritage or religion.

We should also be wary of attempts to politicize the judiciary, whether it be by describing federal judges as Democrat or Republican or by encouraging them to attend meetings with and hire clerks from among people who agree with the politics of the president who appointed them. I have seen several prominent judges hailed as heroes at ideologically oriented groups such as the Federalist Society and the American Constitution Society (and almost never the same judge at both of these organizations). Judge Noonan would speak for these and many other organizations, but the hero worship of ideologically driven judges was not for him. Hopefully the time will come when we too realize that the vision of judges as party members and ideological warriors is highly destructive of an independent judiciary and of our democracy.

In closing, I thank you, Judge Noonan's colleagues here on the Ninth Circuit and Justice Kennedy, for your commitment to the rule of law, to an unbiased and independent judiciary. As Judge Noonan looks down upon us

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7. John T. Noonan, Jr., and Richard W. Painter, *Professional and Personal Responsibilities of the Lawyer* (Foundation Press 1997, 2003, 2011).

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all, I urge that you and the members of the bar of this court continue to work as long as you are able to fulfill his vision and our common vision of the rule of law in America. Thank you.







By Jeff Powell<sup>1</sup>

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## **Passion and Personhood: Reading John Noonan's *Persons and Masks of the Law***

For many years, I have taught John Noonan's *Persons and Masks of the Law* in a seminar taken for the most part by third-year law students. (In a period when the book was generally unavailable, Judge Noonan graciously permitted me to photocopy and distribute it at cost.) More recently, I have read *Persons and Masks* with seminar-size groups of sitting judges. Each careful reader has a distinctive reaction to a rich and demanding book, and I have had the great good fortune to study *Persons and Masks* with many careful readers. It still is possible, I think, to advance some generalizations that will be roughly accurate.

Almost everyone who has taken either course identifies two aspects of *Persons and Masks of the Law* as unusual or even odd. The heart of the book lies in three case studies, but despite their familiarity with cases—law students spend much of their time carting around casebooks, and judges deal with cases every day—Judge Noonan's approach to cases strikes most readers as strange for two reasons: his attention to details; and his transparency about his moral and philosophical commitments. As for the first oddity, Noonan is interested in recounting all manner of facts that may seem irrelevant or even trivial, such as Chancellor George Wythe's will, Justice Holmes's investment practices, and the professional inadequacies of Matthew Wood (Helen Palsgraf's lawyer in the famous *Palsgraf* case).<sup>2</sup> Just as idiosyncratic is

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1. H. Jefferson Powell is Professor of Law at Duke University School of Law.

2. John T. Noonan Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* 30, 104, 123–26 (2d ed., Univ. of Cal. Press 2002). All page citations are to this edition, the text of which is

Noonan's willingness to put his personal beliefs on full display. One example will probably suffice. In his original foreword, Noonan wrote that he thought the "central problem...of the legal enterprise is the relation of love to power." He proceeded to explain that the only acceptable solution to the problem lies in "Augustine's sublime fusion...in which justice is defined as 'love serving only the one loved.'"<sup>3</sup> Virtually everyone, 3L and judge alike, reads these words with considerable surprise. Love is not a common topic for discussion in law school classrooms, nor do most legal writers speak so openly of their personal and passionate beliefs.<sup>4</sup>

Where the law students and the judges part company is in their evaluation of these two distinctive characteristics of *Persons and Masks*. The students by and large have no problem with Judge Noonan's willingness to express his ethical stance and his specific moral judgments—but they are often bemused or even irritated by the factual specifics. Perhaps, they think (silently or aloud in protest), there *might be* some value in knowing that the United Fruit Company ran the republic of Costa Rica as a wholly owned subsidiary in the first decade of the twentieth century. That fact, they grudgingly concede, raises a question about the Supreme Court's assumption, in deciding *American Banana Company v. United Fruit Company*, that Costa Rica's government was acting as a sovereign rather than as the tool of United Fruit's monopolistic plans.<sup>5</sup> But they tend to resist Noonan's (and my) insistence that they will better understand *American Banana*—and the law in general—if they read over twenty pages describing the lawyers, lower-court maneuverings, and Supreme Court arguments in that case.<sup>6</sup> In contrast, the judges with whom I read *Persons and Masks* appreciate and even enjoy the historical details: Noonan writes about cases as they *experience* cases, with real parties, actual controversies, counsel adept and inept, social contexts, and so forth. What the judges often object to is Noonan's moralizing, as some of them see it—the sense they get (despite his disavowals and my protests to the contrary) that he is arguing for judicial decision-making according to the individual judge's ethical predilections,

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unchanged from the 1976 first edition except by the addition of a new preface.

3. *Id.* xx.

4. By "passionate" I do not mean "unreasoned," as if thought and emotion were simple opposites—a dichotomy that Judge Noonan would not have accepted. Occasionally someone is troubled by the theological tenor of Noonan's thinking, but this reaction is (surprisingly?) rare.

5. 213 U.S. 347 (1909) (holding that the Sherman Act did not encompass a claim based on an act by a foreign sovereign).

6. *Persons and Masks*, *supra* note 1, 81–102.

that Chief Judge Cardozo should have ruled for Mrs. Palsgraf because she was poor and poorly represented.<sup>7</sup>

I have long asked myself what is to be learned about *Persons and Masks of the Law*—and about Judge Noonan’s understanding of law—from the overlapping but partly discordant responses of these two groups of readers, keeping in mind that I am making broad generalizations. Over time I’ve come to three conclusions (discreetly ignoring what their responses may say about flaws in my teaching!).

The 3Ls and the judges are entirely right in their shared sense that the book is highly unusual. *Persons and Masks of the Law* surely is one of the strangest, most revolutionary, and most wonderful books on law ever written by an American lawyer. Central to the book is Judge Noonan’s idea of the mask, the verbal construct that judges (and others) use to disguise the presence of persons within the legal process—persons including the judge, the plaintiff and defendant, the lawyers, and the victims. Noonan isn’t referring to the psychological devices by which individuals caught up in the process may address the stresses thus caused, although his idea is not entirely unrelated. Masks, as Noonan uses the metaphor, are verbal tools and techniques that lawyers in our tradition have crafted over time (they are “socially fashioned” rather than “purely private projections”) that deny the humanity of the participants in the process, that turn a judge into “the court,” and Helen Palsgraf into “the plaintiff,” and African American slaves in Revolutionary Virginia into chattel. “By mask I mean a legal construct suppressing the humanity of a participant in the process,” he wrote. Noonan rejects the temptation to accept such masks as inevitable, as if the judge has no choice but to impose a mask on himself or on others: to deny responsibility is itself to don a mask. At the same time, one of the central messages of his book is the pervasiveness of the temptation, above all for judges and other legal decision makers, to hide from themselves the fact that all involved in the process are persons, engaged whether happily or not (generally not) in human relationships with one another and with others.<sup>8</sup>

The central argument of *Persons and Masks of the Law* is not that judges should allow their awareness of their and others’ humanity to change how they apply legal rules. In his 2002 preface, Judge Noonan wrote that “the book was often understood as a book about how cases should be judged....But my book was not about how to decide a case.”<sup>9</sup> *Persons and Masks* is not a handbook of jurisprudence but a warning that the suppression

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7. See *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (1928) (holding that Palsgraf’s action in negligence failed as a matter of law).

8. The quotations are from *Persons and Masks*, *supra* note 1, 20 and 22, respectively. Noonan’s general description of his idea of the mask is on 19–28.

9. *Id.* ix.

of our awareness of the persons whom the law addresses (as judge, party, or other) can turn the law into an inhumane nightmare. Lawyers and judges worry about the threat arbitrary and subjective judgment poses to the rule of law, and rightly so; they are, far too often, blind to the threat that decision-making emptied of humanity poses to the humane purposes of the rule of law. "Abandonment of the rules produces monsters; so does neglect of persons....[M]asks are monsters as dangerous as those issuing from the sleep of rational rules."<sup>10</sup> Noonan's painstaking case studies are designed to illustrate this danger. "The stories in this book are fables for our time," not critiques of past lawyers' reasoning.<sup>11</sup>

I have now read *Persons and Masks of the Law* many times, and I have discussed it with many people. Almost everyone, even the most critical reader, ends up sharing my sense that "the stories" succeed in upsetting any sense of complacency about the law. Judge Noonan's first "case" is a disturbing exploration of the critical role that Chancellor Wythe (perhaps the most revered legal figure in late-eighteenth-century America) and Thomas Jefferson played in enabling slavery to endure the challenge posed by a Revolution justified in the name of liberty.<sup>12</sup>

Whatever one is to make of Jefferson (who is for many no longer the icon he might have seemed in 1976 when *Persons and Masks* was written),<sup>13</sup> Noonan convincingly shows how Wythe, a sitting judge, usually hid himself

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10. Id, 18, 26.

11. Id, xiv.

12. *Persons and Masks* painstakingly analyzes the central role of law in creating and sustaining slavery in colonial Virginia; see 35–46. On Jefferson's initiative, in the fall of 1776, the Revolutionary state legislature decided that "our whole code must be reviewed [and] adapted to our republican form of government," and appointed Wythe and Jefferson to the committee given that task (46) (quoting Jefferson). Offered the chance at the least to propose the restriction or ultimate elimination of slavery from Virginia law, Wythe and Jefferson reported a bill to rationalize and render more effective existing slavery regulations, which the legislature eventually enacted: "[T]hey as human beings performed the acts by which slavery was continued as a legal institution" (54). Identifying the irony involved in the perpetuation of human bondage by the Revolutionary proponents of liberty is not a modern discovery. As Dr. Johnson sardonically asked, "[H]ow is it that we hear the loudest yelps for liberty among" slave owners? See Samuel Johnson, *Taxation No Tyranny* (1775), <http://www.samueljohnson.com/tnt.html>.

13. Conor Cruise O'Brien famously made the case against Jefferson *without* primarily relying on his personal behavior as a slaveholder in O'Brien, *Thomas Jefferson: Radical and Racist*, *The Atlantic* (October 1996), <https://www.theatlantic.com/magazine/archive/1996/10/thomas-jefferson-radical-and-racist/376685/>.

behind a mask of impersonal justice, and masked the personhood of African Americans just as thoroughly through the impersonal language of property law. The exception to this rule was a case called *Hinde v. Pendleton* in which Wythe allowed himself to see the slaves who were the subject of the suit, and the contending (white) parties, as persons, in relationship to one another and to Wythe himself: “[T]he mask of the slaves was half lifted, and the mask of the court was half removed.” But although Noonan describes Wythe’s judgment in *Hinde* as a “splendid climax,” the deeper point is that *Hinde* demonstrates that neither law nor social pressure compelled Wythe’s ordinary resort to masks; his complicity with slavery was a choice, even if one that he partially concealed from himself.<sup>14</sup> The later chapters addressing *American Banana*, which Holmes decided by invoking “a ‘pure fact’ which did not correspond to” any of the actual facts of the case, and *Palsgraf*, in which Cardozo crafted a “wonderfully abstract world” where the parties could “be only A or B,” not a poor and injured woman and a profitable and insured business, are equally pointed.<sup>15</sup>

The message of *Persons and Masks of the Law* is not, in the end, entirely monitory. Wythe and Cardozo, each thought almost saintly by his contemporaries, and Holmes, “the great overlord of the law,” as Cardozo called him,<sup>16</sup> erred grievously in their use of masks. However, we still can ask, what then is to be done? The answer, Judge Noonan suggests, lies in reorienting how we think, teach, and learn law. The title of his last chapter is “The Alliance of Law and History,” and it is from history that *Persons and Masks* proposes we learn, at least in part, how to resist the temptation to resort to masks. The use of masks—in litigation as it is going on, and in the “cases” as they are studied and taught and cited by judges and lawyers and law teachers and students—is the means “by which persons are removed from the legal process.”<sup>17</sup> But those who seek “good historical knowledge”<sup>18</sup> cannot wear or impose masks if they are to achieve their purpose. “The ability to distinguish between persons and masks is the ability on which history depends,” and so “by historical reconstruction, the persons may be

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14. *Persons and Masks*, *supra* note 1, 64. Wythe deliberately put *Hinde v. Pendleton* last in his published reports of his decisions, and thus his very human reaction to a case involving a “sordid manipulation of the relations between persons” was the climax of the written record of his judicial work.

15. *Id.* 109, 144.

16. *Id.* 66 (quoting an essay by Cardozo).

17. *Id.* 25.

18. The immediate contrast is with the “[pseudo-]history often made by judges and lawyers,” but the distinction applies as well to those who overtly deny that “there are true historical accounts.” *Id.* 156–57.

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restored.”<sup>19</sup> The promise of *Persons and Masks* is that through attention to the factual details, the once-living persons, and the motives and consequences of human behavior that are the historical truth of the law’s past, we can learn to think of the law, past and present, in terms of the persons who are, or should be, central to it.

*Persons and Masks of the Law* is, in the end, a book about learning the law. “The book [is] an argument as to how the legal process should be understood, how it should be taught, and how it should be remembered.”<sup>20</sup> But Judge Noonan certainly did not intend to limit its relevance to law schools and J.D. candidates, or to legal historians. All lawyers, including those whose practice takes the form of judging, are simultaneously teachers and students, and we misunderstand our subject if we limit our professional attention to rules and ideas, and forget the persons (including ourselves) to whom we apply our rules. No one has argued more personally or more passionately for this principle than John Noonan, and in doing so he has reminded us that the personal and the passionate are central to any law worth learning.

“The community of rational discourse is rooted in the history of human beings. Persons speak to persons, heart unmasked to heart.”<sup>21</sup>

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19. *Id.* 167, 25.

20. *Id.* ix. The quotation is from the 2002 preface, but Noonan was clear about his purpose in his original text. “My concern is what a legal historian should record, what a legal philosopher should explain, what a law professor should teach” (142).

21. *Id.* 167. These are the last words in the text of *Persons and Masks*.

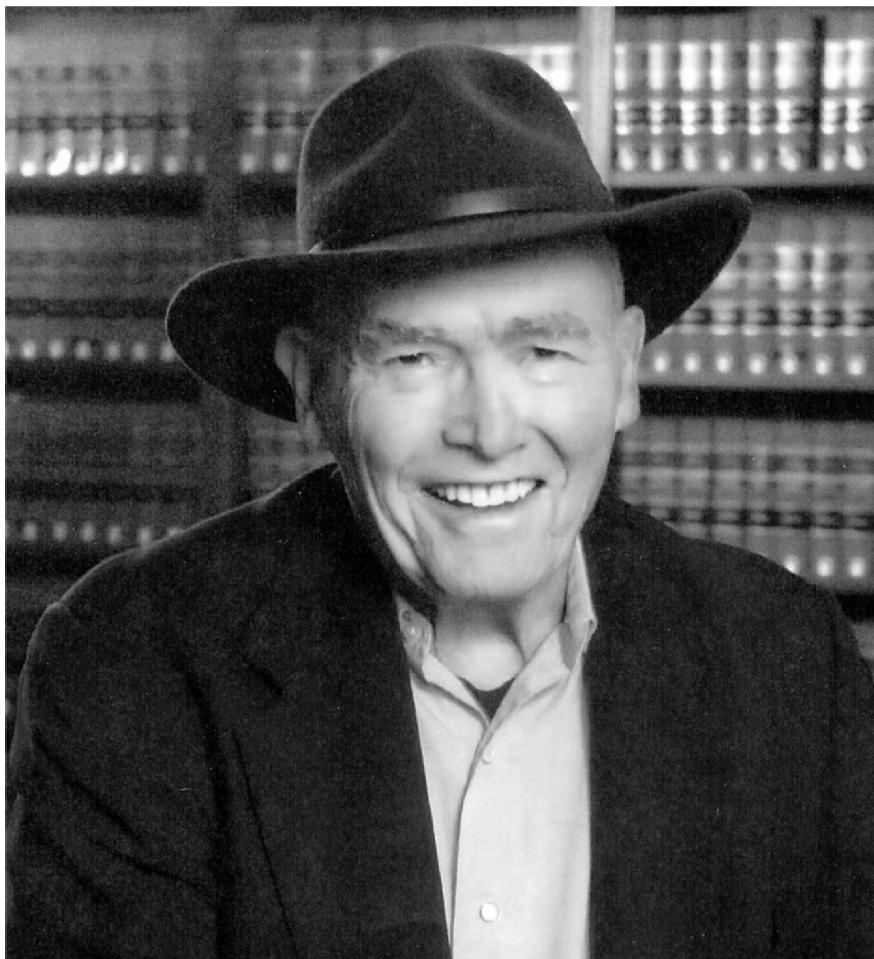
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**Remarks from:  
A Celebration of Life  
Shrine Auditorium  
December 1, 2017**



*Judge Harry Pregerson  
October 13, 1923- November 25, 2017*





### *Remarks of Katie Rodan<sup>1</sup>*

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Thank you all for coming to honor my dad. I loved him so much, and I know all of you did, too.

As much as he meant to you, I want you to know that you all meant the world to him. Your problems became his problems, and your triumphs brought him the greatest joy. He cared. He really did.

On the night when he passed away, I sat in his home office, where he'd worked for sixty years. At first glance, it looked like Hurricane Katrina had just blown through—there were papers, books, mementos, and pictures covering every square inch. This was Harry's inner sanctum. You could learn a lot about my dad—his values, his motivations, his inspirations—just from seeing what was there.

As I went through his desk, I found hundreds of letters, handwritten notes, and cards. I guarantee that if you ever wrote him a personal note of gratitude or sent him a "small world story" in the past seven decades, it's there, crammed into one of the drawers. He kept all of you close at hand. He lived to help others.

Along with your letters, I found a sheet of notebook paper with my seven-year-old handwriting. Harry—yeah, I called him by his first name, not Daddy, Dad, or Papa, and if you are wondering why that is the case, ask my big brother, Dean. It was his doing. Anyway, Harry had me write a hundred times, "I will not yell, I will not yell, I will not yell," after he caught me running and yelling in a hotel hallway. He wanted to drill into my head how important it is to be considerate of others.

On his shelves were books on grammar, several dictionaries and history books, and books by Dale Carnegie on self-improvement. He always viewed himself as a work in progress and had a lifelong desire to improve

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1. Dr Katie Rodan is a dermatologist, entrepreneur, and author. She describes herself as the "luckiest girl on earth to have been the daughter of Judge Harry Pregerson, her mentor, father, and exemplary humanitarian."

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and learn. There were biographies of his heroes, like Mark Twain, Lincoln, and JFK. He treasured a copy of the Old Testament passed down by his dad, whom he revered, and often had it in his briefcase for good luck.

Almost as much as he valued mental acuity, Harry thought physical fitness was critical to keep you on top of your game. He wanted to be strong so he could always go the extra mile for someone. In his office, I found two different hand grippers to help him maintain that strong handshake of his, along with some free weights. Even in his nineties, he would show off his biceps and loved to challenge people (even me) to a good ol' arm wrestle. Once a Marine, always a Marine.

Lastly, pictures of people are scattered everywhere in his office. My beautiful mother, from the days when they first met until her ninetieth birthday this past August. He adored, admired, and drew his strength from her more than from anyone else in this world. Pictures of Dean and me on our many summer trips. Family was number one in his eyes, and when Dean and I would fight, he'd say, "Stop, look at each other. You are going to be each other's best friend throughout life." There were pictures of his dear buddy the late congressman Jim Corman. Pictures of the guys he served with in the Marines. And finally, pictures with many of you at the Bell Shelter, the courthouse, and any of the hundreds of charity events he loved to attend through the years, usually escorted by his law clerks, who were like his kids. We were all the center of Harry's universe. As I said at the outset, if you want to understand what made my dad tick, the clues are in that very messy office.

As a dad, Harry wanted to pass on his values to my brother and me. My aunt often told me that dad had always wanted another boy. Well, for better or worse, he got me. I popped out on Father's Day 1955, and ever since I have been a daddy's girl. Harry told me that from the moment he looked through the hospital nursery window, he knew I was his daughter. All the babies were sleeping, except for one, who was wide-eyed and looking around the room as if I to say, "Harry get me outta this place. I have things to do!"

I think he decided early on that he wouldn't raise me any differently from how he was raising his son, Dean. He made sure I felt like a girl who could do anything, someone who was tough and had the fortitude to take care of herself and weather any storm.

We had chin-up bars in the house and in the backyard. Often when I'd walk by them, he'd yell, "Gimme five!" When I finished, I was told, "Now do ten push-ups." He taught me self-defense moves in case someone grabbed me. I didn't even get in trouble with him when in first grade I gave Mike Shaw a black eye for trying to kiss me (my mom always taught me to play hard to get).

A turning point in my life came when I was in seventh grade and my mother announced that she was going back to school to study microbiology. Boy, was I was mad at her. I told her she already had a job, and that was

taking care of Harry and me. By then Dean was already in college. Bern told Harry that he needed to “step up to the-plate” and assume some responsibilities as a parent—like picking me up after ballet class, helping me with my homework, and making us dinner.

Because my dad was helpless in the kitchen, he and I went to Nibblers restaurant every night Mom was out and ate our favorite meal—plain hamburgers and baked potatoes. Over those many dinners and hours of conversation, Harry told me stories and shared life lessons that I hear in my head every day and that have continued to influence every aspect of my life.

I remember him saying one night at Nibblers, “Your mother, Bern, is brilliant. She can read a book a day. Ask her any question and I guarantee she knows the answer. She gets As in all her graduate school classes, and besides all of that, she’s a Jane Austen scholar.” Then he turned to me and said, “But, kid, you and I—we’re just average, and we need to work really hard.” I thought, “Wow, Harry’s my hero. He’s the most accomplished person I know. Maybe if I work hard, too, I can do something worthwhile with my life, just like him.” That lesson has never left me.

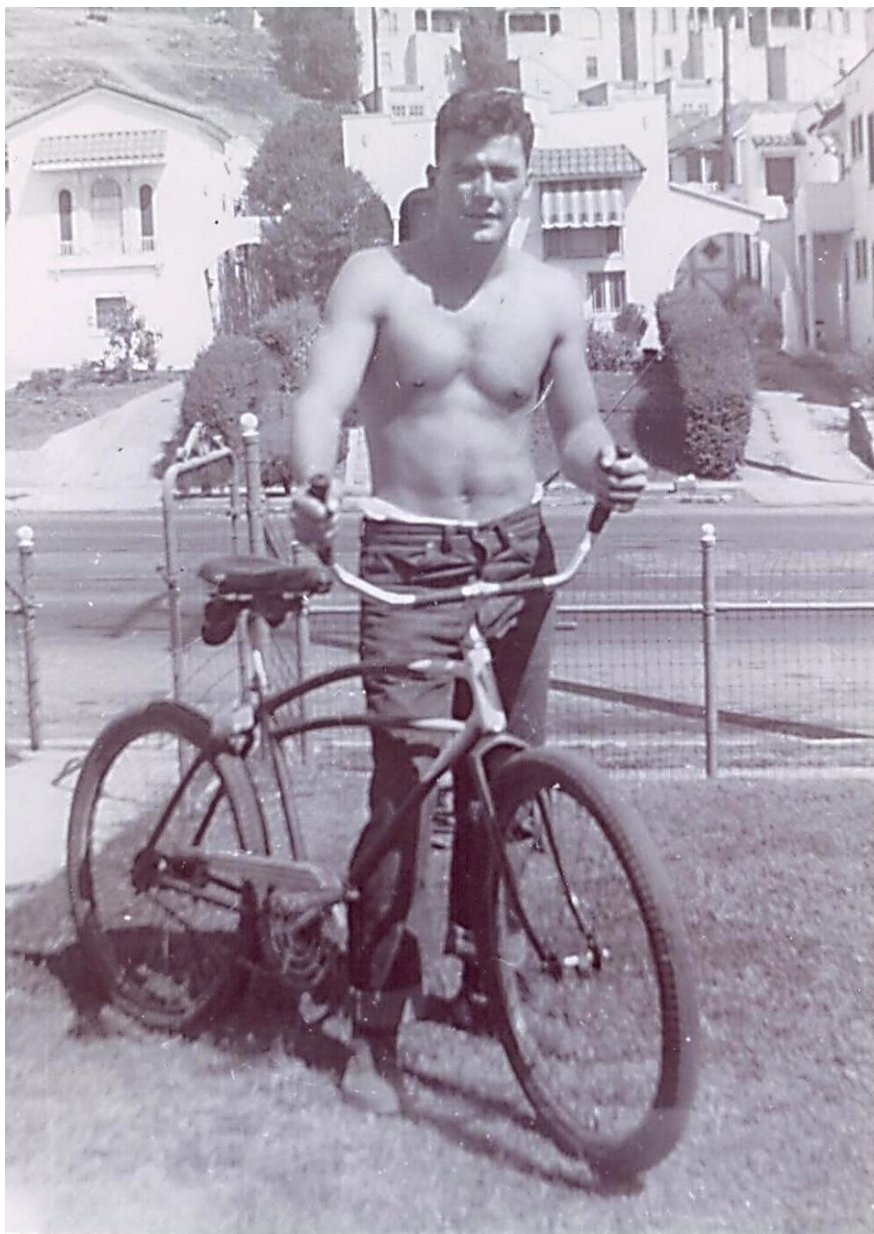
Over dinner another day, he told me what a mediocre student he was in elementary school and that, far and away, the brightest in his classes were the girls. “And what happened to those girls?” he’d ask. “They got married out of high school, put their husbands through college and grad school, and then raised the kids while their husbands became partners in law firms.” Then came the moral of the story: “And guess what happened to a number of those girls? In some cases, their husbands died, leaving them widowed in middle age, too late in life for them to pick up the pieces and start a career. In other cases, the husbands got bored and their marriage ended in divorce. It bothered him so much that those bright women never had the opportunity to live up to their potential. “That’s why, Katie, it’s important to get a good education, so you can be your own boss, make your own money, and determine your own destiny *even* if you are lucky enough to marry the man of your dreams (which I did when I married Amnon thirty-four years ago, whom my dad called the “bane of his existence” because Amnon was so perfect that he made my dad look bad in my mom’s eyes). Harry’s message to me about strength and independence was a powerful and rare one for a girl of thirteen in the 1960s to hear.

At Nibblers I’d watch my dad giving immigration advice to the waitress and talking to anyone who happened to sit within earshot of us. Everyone became his friend, and the next thing I knew, he’d be giving them our phone number and inviting them to his chambers. He never gave me that parental warning “Don’t talk to strangers.” No one was a stranger to my dad. He always felt that by being open and friendly, you never knew whom you were going to meet and how that person might change your life, or you theirs. To Harry, most people fell into one of two camps: either they were someone he could help or they were a potential resource for when he needed to help someone else.

After years of observing him in action, I gave him the nickname the “Rescue Machine,” which he loved. One day, when I was kind of mad at him for not helping me solve a personal crisis, I said, “Harry, you’re the Rescue Machine, right? How come you’ve never rescued me?” My dad simply said, “You don’t need rescuing.” It was the most empowering thing he ever said to me. By then he knew he’d successfully passed on to me a sense of purpose, self-reliance, physical and mental toughness, and, most of all, compassion and a desire to do good in the world.

My dad was famous for saying, “Happiness is bullshit” (his words, not mine). As I kid, I thought he was being a curmudgeon. But as an adult, I understand what he meant. Life isn’t about pursuing your *own* personal happiness. You become a truly happy person by helping others. He was motivated by his abiding belief that it’s our duty to leave this world a better place. Like me, many of you in this room were inspired by Harry to follow in his footsteps and be a Rescue Machine in whatever capacity you can.

Harry’s parting words to my mom were “I am no longer physically able to help people.” He knew that his work was done. Now it’s up to us to carry on his legacy.









The Honorable Dean Pregerson

## Remarks of Dean Pregerson<sup>1</sup>

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Dear Dad,

I have struggled with what to say. The stories about you that I could tell—hundreds of them. The lessons and inspirations you provided—endless. I must somehow do right by your amazing life, I said to myself. I put a lot of weight on my shoulders and I froze. There was too much of...well, everything. But I took a little walk and you gave me the answer, like always. “Dean,” you said, “all I want to hear is that you loved me and I was a good Papa.” Dad, I love you. You were the best Papa in the world. My Papa.

Harry, I am now going to say a bit more. We ache, but we rejoice at having known you and at celebrating a life such as yours. Was it yours? Surely not yours alone. You were good at sharing. Pulling us along. Charming and dazzling us. You took us by the hand, and we romped through this adventure together. All of us. Everyone here. Our adventure. Together. Thank you, Dad.

It’s been a rough three years for our family. Our beloved son David is in heaven now with his grandpa. My wonderful wife, Sharon, lost her brother one week ago, and now our dear Harry. What has kept us going? Each other. Our big boy, Brad, my mom, my dear sister and brother-in-law, Katie and Amnon Rodan, our big extended family, and you, you, you. All of you here today.

We come to celebrate *our* Harry. I say *our*. The truth is that when I was a boy, I didn’t see as much of Harry as I would have liked. I felt a little sad about that. But I realized that, as Katie said, Harry was the Rescue Machine. There were a lot of people who could use a Marine in their corner. I was like the kid with a toy on the playground. You learn to share. You learn it’s right to share. So, like I said, we celebrate *our* Harry.

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1. The Hon. Dean Pregerson is the son of Judge Harry Pregerson, and is a judge on the District Court for the Central District of California.

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And, Dad, I also couldn't help imagining you here today. It made me smile. You would be about an hour late, and you would be the last person to walk out the door.

And, Dad, I know you would want me to say this: Harry spent about a year at the Naval Hospital in San Diego. His weight went up from 110 pounds to a healthy 175. He then went to study law at Boalt Hall, Berkeley, on the G.I. Bill. He had a limp and a cane.

One day, he was playing pool with one of his buddies. Harry said, "Hey, do you know any girls I could meet?" His friend said, "Well, I am going on a date with this girl, I'll ask if she has any friends. We'll come by and pick you up." Harry said, "That would be great." They pick Harry up, Bern is sitting in the front seat with Harry's friend, who is driving. Bern's friend is sitting alone in the back seat. Harry opens the door, looks at Bern, looks at his date, and he sits in the *front* seat. And from that day forward, he knew he was going to marry Bern. Once Harry makes up his mind, there is no stopping him. He was determined to get rid of all of Bern's other boyfriends. He shows up one day at Bern's parents' house, tells her parents he is going to help with the rent, and throws his duffel bag on the couch. He had a real agenda, and that was to slam the door on anyone who came calling on Bern. That's exactly what Harry did. Then he started proposing, and Bern realized that he wasn't going to stop until she said yes.

And Mom, our dear Bernadine, everything that Harry has ever done—all the good, all the awards, the successes, the projects, the countless people he laughed with and lifted up, and the bringing us all together—would not have happened without the seventy-year partnership he had with this devastatingly smart, kind, wise, and beautiful young woman he met on that blind date. Mom, the Rescue Machine for the Rescue Machine. All the love here flows to you, too.

I'll share a few stories of what it was like to grow up with Harry.

Imagine you are a barely literate young teenager. You're happily reading the Hardy Boys and watching *Sea Hunt* on TV. Harry strides up and hands you a poem. "Read it, Dean. It's called 'Invictus.'"

"Why?"

"Builds character." (Turns out he also pulled the same "Invictus" trick on my sister.)

*Out of the night that covers me,  
Black as the pit from pole to pole,  
I thank whatever gods may be  
For my unconquerable soul.*

*In the fell clutch of circumstance  
I have not winced nor cried aloud.  
Under the bludgeonings of chance  
My head is bloody, but unbowed.*

*Beyond this place of wrath and tears  
Looms but the Horror of the shade  
And yet the menace of the years  
Finds and shall find me unafraid.*

*It matters not how strait the gate,  
How charged with punishments the scroll,  
I am the master of my fate,  
I am the captain of my soul*

And there was much more to Harry's character-building project. Sometimes I wondered if Harry thought of me as Dean or He-who-is-in-need-of-character-enhancement. It went something like this:

A knock on my bedroom door. "I need you to clean the garage."

"Why? It's fine."

"Builds character."

Knock. "We are going to scrub the bathrooms and the toilets."

"Why?"

"Builds character."

Knock. "Time we cleaned the garage again."

"Why?"

"Builds character."

It turns out, though, that all that character-building work did have an unexpected side benefit. People would come up to me and ask, "Isn't it intimidating being the son of such a well-known judge?" Or "Isn't it hard to follow in your father's footsteps?"

I would always say, "You know, we cleaned a lot of toilets together, so I don't really feel all that intimidated."

Let's move forward a bit. When Harry was working his way through UCLA, washing dishes at fraternities and sororities, he decided to run for student body president. His dear friend Frieda Caplan is here. She helped run his campaign. Those were different times. Anti-Semitism was not in the shadows. There were restrictive covenants in deeds. Some schools had quotas. Private clubs had Jews-not-allowed policies. Anti-Semitic slogans and jokes were common. No one who was Jewish had ever been elected as student body president. The campaign turned ugly. The other side smeared Harry's heritage and said all sorts of terrible things about him. Harry in despair went to see the campus rabbi. "What should I do, Rabbi?" he asked. The rabbi said one word—a word that carried Harry through the rest of his life: "*Fight*." Harry the dishwasher won in a landslide. As an aside, it probably didn't hurt that he washed a lot of dishes at the sororities. Oh, you charmer.

Let's skip forward a little more: Harry and three of his Marine buddies are sent to the Pacific. One is killed, one loses an eye, one a leg, and there is Harry.

Yesterday, for the first time, I saw Harry's DD 214 form, his certificate of discharge from active military service. It summarizes his time in the service. Total years in service: 4 years and 28 days. Foreign Service Time: 7 months and 7 days.

Foreign Service?

A little context about this Foreign Service reference for you younger folks. For Harry, it meant the Battle of Okinawa. Here is how the *New York Times* describes the battle: "More than 200,000 perished in the 82-day struggle—twice the number of Japanese lost at Hiroshima and more American blood than had been shed at Gettysburg. [A marine sergeant recounts:] My own regiment—I was a sergeant in the 29th Marines—lost more than 80 percent of the men who landed on April 1, 1945. Before the battle was over, both the Japanese and American commanding generals lay in shallow graves."

It's May of 1945. Okinawa. Harry is hit in both legs by bullets from a machine gun shooting dum dum rounds. They explode. He is able to lie flat on his back in a small depression of dirt while bullets fly in both directions. He slows the bleeding by using his belt and clothing as tourniquets. Through that long night, alone, he hears, "Marine, tonight you die." At dawn, two guys run through Hell to get him. They drop him several times as they try to escape—try to stay alive. And this is where we skip back a little and remember that Harry is from in East L.A. and proud of it. His friends were working-class Latinos, Jews, Asians, Italians, Irish—you name it.

The guys who saved his life were the Martinez cousins. He didn't know them, but he knew them. They were just like his buddies from the old neighborhood—the greatest guys in the world.

So when people ask me, "Doesn't Harry fret when someone uses harsh words against him?" Or "Doesn't Harry fret when—horror of horror—he is reversed?" The answer is always the same: "Not so much."

In my struggles to do a good job today, I ask my mom to talk to me about what she thought made Harry so special. "It's simple," she said. "Harry was a person with no guile. Within five minutes, you knew who he was. He was also pretty binary with people, you were his friend and he would hit the beach with you, or you were just plain no damn good."

Another thing my mom and I have both observed is that when people mention Harry, they almost always smile. It's like they lose control of their lips. The smile just busts out.

"I met your dad." Smile busts out. "I had my first trial before your dad." Smile busts out. "Your dad told me a story." Smile busts out.

One more H.P. tale. About twenty-five years ago, I was sitting next to Harry at a Yom Kippur service. It was cold outside, and there was a homelessness crisis in L.A. Harry said to me, "Read this." He pointed to Leviticus 23:22. "And when you reap the harvest of your land, you shall not wholly reap the corners of thy field, nor shall you gather any gleanings from your harvest; you shall leave them for the poor and for the stranger." The

next day, he got up, rolled up his sleeves, and went to work for the homeless and our vets.

Two days ago, I was at my mom's place. I had just parked. The mail truck drove up to the box and the mailman jumped out. He didn't speak English clearly, and I don't speak a word of Vietnamese. He hugged me and said, "I am sorry about that. He my best friend."

My mom came home that same day, and their gardener was crying. He told my mom that he didn't know what to do, so he had bought plants that Harry liked and was planting them around the house.

Two nights ago, my wonderful niece Daniella said, "I know it sounds like a cliché, but the world is less just without Harry."

A friend wrote to me, "Where are the other guardians for those less fortunate?"

My buddy John Wirth asked me: "What happens to all that is Harry when he is gone? Is it all lost?"

No. It is not lost. None of it. I carry a big part of Harry in my heart. I know that a lot of you do as well. Harry once said during a TV interview, "God put us here to take care of each other, and I really believe that." So do I, Dad. Thank you for sharing your life with us. For being *our* Harry.

("And, Brad, don't forget to read 'Invictus.' Builds character.")



## Remarks of Bradley Pregerson<sup>1</sup>



When I was eight years old, my grandfather gave me a stone with the inscription “Never, never, ever, quit.” Being eight, I didn’t have anything to quit from.

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1. Bradley Pregerson is Judge Pregerson’s grandson and a deputy city attorney with the City of Los Angeles. He is also the co-founder of the non-profit GrowGood, which operates an urban farm at the Salvation Army Bell Shelter that provides food, job training and employment opportunities to the homeless.

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When I was ten, my grandfather bought me the book *How to Win Friends and Influence People* by Dale Carnegie. Win friends? Influence people? I was focused on trying to be like Michael Jordan.

As I got older, my grandfather continued to buy me books: biographies of Abraham Lincoln; speeches of Winston Churchill; and William Strunk and E. B. White's *Elements of Style*, a book that he would constantly remind me was the classic manual on the principles of the English language. One summer, we went through this book cover to cover. He would call me on Sunday mornings and say, without any introduction, "Turn to page 57" During one weekend session that I will never forget, because it was a particularly beautiful summer day, I asked if him if we could skip that day's session. "Grandpa, it's a beautiful day, I want to go outside and have fun like the other kids." He said, "Brad, let me tell you something: Fun is bullshit." Fun is bullshit? What? That was ironic coming from a person who loved to make people laugh.

But even at twelve years old, I knew what he really meant: Don't waste time. Every day, work toward bettering yourself. Strive to be better.

You might be thinking he tortured me. Yes, maybe a little. But to tell the truth, I loved those Sunday morning sessions, and I cherish every book he gave me, including the boring ones. Grandpa Harry was a scholar, and believed that in order to make sense of the world, a person had to have a deep understanding of history. I am grateful that he taught me this important lesson.

It was wonderful he cared so much. It might sound like he put a lot of pressure on me, but this wasn't the case. He was the best listener and always so understanding. All he cared about was effort. "Just try your best," he would say, "and everything will turn out okay." School never came easy for me, and he told me it had been hard for him, too. He used to remind me that it wasn't until he got into law school that he learned that the word *obtuse* meant "slow to understand" rather than "nearsightedness." "Grandma has the brains," he would always say. "You and I just have to march through the mud."

Often people who are so dedicated to their work and the community leave their families feeling left behind -- not Grandpa Harry. I know all the grandchildren agree that he made us feel loved and that we were the most important people in his life.

I loved watching him interact with strangers. In his later years, I went with him to many dinners and charity events. He would be seated at a table, and inevitably a stranger would approach him and introduce themselves. Grandpa would slowly extend his hand. They would shake, and suddenly the stranger was confronted with a kung-fu grip that he could not escape. The crippling grip continued as pleasantries were exchanged while the stranger pretended everything was normal. The handshake would continue such an unusually long period of time, that the stranger would finally begin to smile or laugh—I'm sure thinking, "This crazy old judge is squeezing the crap out

of my hand and won't let go." Eventually, Grandpa would release his grip, and a conversation, or rather a history lesson, would ensue: "Oh, You live downtown near Pershing Square, you say. Did you know that Pershing was a World War I general?" Soon, contact information was requested, and then exchanged, and the stranger had unwittingly "enlisted" as a member of Grandpa's army.

And I knew from experience that this stranger would soon receive a late-night phone call. Perhaps on a Sunday night, and right when a favorite show came on or dinner was ready, the phone would ring. "Who could be calling at such an hour?" the stranger would ask. The thought of letting the call go to voice mail was quickly discarded because, as we all know, you can't ignore a call from a federal judge. (This applies with equal force to Judges' grandchildren.) So, the stranger would answer the phone, and Grandpa would say, "I need your help on something" or "I just spoke to so-and-so and you need to call him." "But it's late," the stranger would reply. "No, he is expecting your call," Grandpa would reply. The stranger now had marching orders, was suddenly and permanently swept up into the good fight.

I like what John Quincy Adams said about leadership: "If your actions inspire others to dream more, learn more, do more, and become more, you are a leader." I think this sums up what my grandfather was about. And the truth is, that all the good deeds he was able to accomplish were not the result of his efforts alone. No, there was an army of people who stood and fought with him, people who began as strangers, who were brought in with a kung-fu grip, and soon became life-long friends. But, Grandpa certainly wasn't afraid to take bold action, inspiring others to join him, and they did, because all knew he was fighting the good fight, he was a good man, and he would never, never, ever quit.





### *Remarks of Mayor Eric Garcetti<sup>1</sup>*

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Thank you, Dean and Katie, for bringing your father back here for a moment for all of us. Let me start first by observing that the City of Angels mourns with you. But despite the sadness we all feel, I know that the angels are soaring over us today.

I don't remember a time before Harry Pregerson. In fact, when I was born, he had been a judge for four years already. When he was born in 1923 in this town, George Cryer had just been reelected mayor. The 1920s were a decade of growth in Los Angeles, when the population literally doubled, when Jewish immigrants and Latinos were coming to the east side. Two years before Harry was born, the Hollywood Bowl opened, and in the year of his birth, we decided where City Hall should be built. That same year, the Hollywood sign was erected. It may be fitting, indeed, that our greatest symbol came to this city at the same moment our greatest angel was born.

Often we go to a memorial service and look to find a friend; here, we look to find a spare seat, and we have even had to move to an auditorium because of all the love. Sometimes we are called on to speak, and we have to work hard to find enough words to say. Here the challenge is to trim our words, because there is so much to say. Sometimes we stretch to find accomplishments to speak of. Here, try as we might to include them all, we must surrender to the reality that there are just too many and we can touch on only some of them.

At a time when so many people look for something to set them apart, Harry Pregerson was a man who stood for what brings us together. The Irish poet Patrick Kavanagh wrote, "A man is original when he speaks the truth that has always been known to all good men." By that measure, Harry was indeed an original. Growing up, I learned from my father how important a legal mind Harry Pregerson was. But I also learned from my father what a moral mind he was, too.

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1. Eric Garcetti is the Mayor of the City of Los Angeles

How many people in this room clerked for Harry Pregerson at some point? Raise your hands. Turn around and look. And there were so many more who are not here today. One of my deputy mayors, Nina Hachigian, who was just recently ambassador to the Association of Southeast Asian Nations, and Karl Singer, my associate counsel, are just two of many.

Harry's effect on others radiated outward, in this town and around the globe, not like a stone but like a giant boulder. He taught each and every one of us that all judges should be social workers. We hear the term "activist judge," but that doesn't really capture the kind of judge Harry Pregerson was. He taught us that it is not just what you do with your hands in the legal opinions that you write but also what you do with your feet outside the courtroom. How, led by your heart and your conscience, you dig in and change the world around you.

We need Harry so much right now, in this time of poverty and of homelessness, of veterans coming home from the longest war this nation has ever waged. We need him now. It was when he was driving through skid row that he realized it was not just what he decided in the courtroom but what he could change in the world outside the courtroom that mattered, and he created the Bell Shelter. When a proposed freeway through south Los Angeles was going to uproot low-income families, he stopped it in its tracks. Think of the courage of that moment. This was the first time in the history of our city—perhaps of this nation—that a judge stopped an infrastructure project like that to make sure that something that was supposed to serve everyone did not leave anyone behind. Truly, Harry was a fearless man.

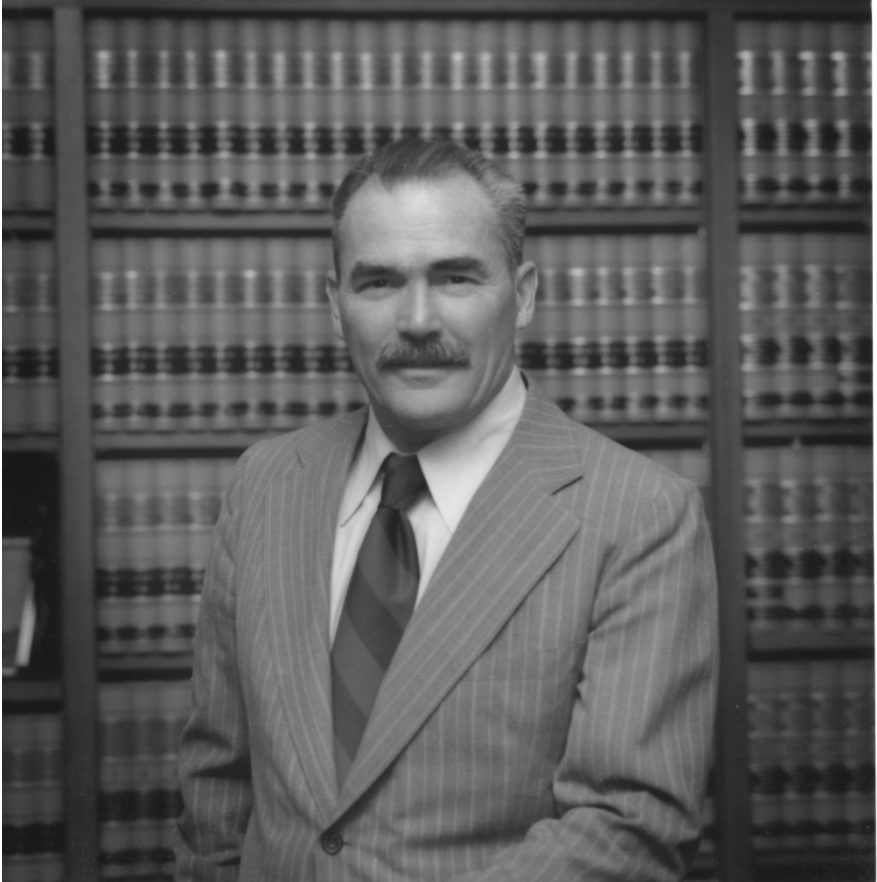
I remember when Harry swore in my predecessor's predecessor, Mayor James Hahn. He was like Moses up there, embodying the law and morality as he bestowed on Jim the honor of being the mayor of this city. But he wasn't a formal guy. He was somebody who understood everyone from the moment he met them, whether they were living on the street, returning home from military service, or a head of state. And the people who came before his bench served as a constant reminder that we are here not to serve our titles or our institutions but to serve the people who come before us.

Harry's drive to help others was transcendent. He was never in it for the attention—maybe partly for the companionship but certainly not for the attention. He knew that at the end of our years, we will be defined by two things: What did we do with our precious days on this earth? and How did we touch their lives of the people we met? If we count our treasures by how we affect the world around us, by the number of people we save, and by the lives that we transform, then Harry Pregerson was a billionaire.

All of us who knew Harry are connected. It is like there is a thread through each of our hearts that Harry stitched and inspired. So let us remember that connection to one another. Let us pick up where Harry left off. Let us remind ourselves that there is still a city to build, and there are still projects to stop, and there are still people to house, and that those voices that struggle to be heard are the ones that we must amplify and raise

up. And if we do that, we will honor the greatest angel that the City of Angels has ever known. God bless Harry Pregerson.



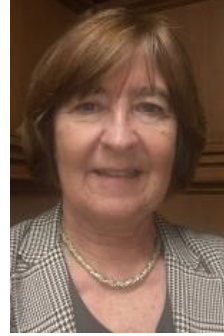












*By the Hon. Maria Stratton<sup>1</sup>*

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## **Ten Things We Loved About HP**

I was asked to speak on behalf of HP's law clerks—past and present. There were more than 150 of us over his forty-five years on the federal bench. To that end, I would like all of HP's law clerks to stand and be recognized.

I venture to say that there is not a person in this room who has not been touched by the judge's good work in the courtroom and in the community. What would L.A. be without his judicial imprimatur on big civic projects like the Hyperion Treatment Plant and the Century Freeway or his active participation in creating homeless shelters in his spare time?

But back to the law clerks. I canvassed several law clerks—past and present—and put together a list: "Ten Things We Loved About HP."

### **10. His obsession with good health.**

When we clerks traveled with HP, we had to jog with him whether we could do it or not. He would stay at the Marines' Memorial Club in San Francisco, and every morning, we would jog before the calendar call. It was brutal for some of us. It was like boot camp. He was blithely unaware of our discomfort.

He worked out four or five days a week, even at age ninety-four. His chambers had gym equipment, which he encouraged and sometimes insisted that his law clerks use. He invited his clerks to work out with him at his favorite gym, his second home.

Probably many of us have received his—sometimes unsolicited—health advice: Wash your hands. Get at least eight hours of sleep. Avoid

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1. The Honorable Maria Stratton is an Associate Justice on the California Second District Court of Appeal.

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stress. A few months ago I received a notice of a subscription he and Bern had taken in my name for a health newsletter. He just genuinely cared about each and every one of us—even after we were long out of his chambers.

## **9. He was always on the phone.**

Movin' and shakin' and wheelin' and dealin.' It could be very frustrating if we were trying to keep him on a deadline or get an opinion out, but he taught us how to get amazing things done by personal contact. Recalling Tip O'Neill and his saying "All politics is local," Harry used to say "All politics is personal." We watched him hatch an idea and then bring it to fruition with constant calling, cajoling, putting people together, and inveigling people with particular skills to help. He was as personal and personable as it gets when it came to a cause that would improve the lives of the less fortunate. His daughter-in-law, Sharon Pregerson, once introduced him at a Salvation Army event as a "leader in the fight against homelessness and human suffering." He was this—and he knew how to use the phone to make things happen.

But not just the phone. If HP were here today, he would love this sizable crowd. He would be working the room, finding support for his latest project.

## **8. He had a perfect story for every situation.**

Harry might tell you fifty tangential stories, but when he finally got to the end, you'd always have an ah-ha moment. And it didn't matter who you were—a twenty-something law clerk, a twenty-year veteran of the U.S. Attorney's Office, or a customer service representative at Verizon—you were going to hear about military strategy in World War II or listen to an endearing story about a schoolmate from East L.A.

## **7. The Oath.**

As new lawyers, most of us clerks had to be sworn in. HP swore most of us into the bar and other positions. After he became a circuit judge, he took the liberty of embellishing the State Bar's Attorney's Oath. He added the words, which he made us repeat: "I will never file an oversize brief."

## **6. Endless editing.**

*Short. Declarative. Sentences.* That was HP's mantra. We would spend countless hours writing countless drafts, trying to achieve it. One law clerk got this comment on her first written assignment after starting her clerkship: "You already graduated from law school. You don't need to write to get an A. You're trying to persuade."

His opinions were crisp and direct and perfectly punctuated. And so were his many thank-you letters. Just to show you how serious he was about writing, when I became a judge, he gave me a robe and a copy of Strunk and White's *Elements of Style*.

I'm not going to lie, he could drive us crazy with his editing. But not a day goes by that we do not obsess about our writing and think about how and why we write.

## **5. His kindness, fairness, and vision.**

Judge Kozinski recently said, "HP never met a stranger." How true that is. If he heard that someone—anyone—needed help, he was on it. How many of us were called by the judge to help someone he had befriended? He collected more than fifty awards for his community work, which would be a full-time job for anyone else. For HP, it was just his second shift.

My partner Mike Lightfoot told me that the U.S. Attorney's Office used to send their rookie trial attorneys to his courtroom to try their first cases because of the kindness he showed them as they were learning their craft.

Not only that, HP regularly hired female law clerks long before many of his colleagues would even consider such a hire. And if you got pregnant? No problem. Just bring the crib to chambers and set it right up.

When we started as his clerks, he told all of us: Right now you are better than 99 percent of the lawyers practicing law. He said it not to criticize the rest of the bar, but to boost all of us up—men and women. He constantly supported us in every way—through births, deaths, marriages, divorces, physical and mental health crises, job changes, doubts, and disappointments. Young lawyers need a confidence builder, and HP was the perfect cheerleader, making time to listen and react.

Harry had a special vision. Many clerks remarked on how HP would comment on a trait he saw in us that we didn't even realize we had or did not think was important. Then he would make the time to nurture that trait to better our professional lives.

And he had amazing vision when it came to civic projects as well. Look at the Bell Shelter—he took a neglected piece of government property and turned it into the largest homeless shelter in the west.

And he had amazing legal vision, too. His dissent in *Sullivan v. INS* in 1985 lamented the failure of the court to recognize the importance of a party's same-sex marriage. In 1998 in *US v. Lipman*, long before DACA, he authored a little-known opinion that gave legal recognition to real life on the street—that it is no surprise that children brought to this country illegally by their parents become as American as the rest of us.

#### **4. He was a judge *and* a comedian.**

As one clerk said, HP made argument fun and not too serious. For example, HP would tell lawyers who spoke too softly to speak into the “breathalyzer” (his name for the microphone). He would put people at ease instead of intimidating them. It was not about him, unless he was telling a self-deprecating tale to get a point across.

No one could pull off a hat and a cane like HP. He took the cane, an item that some might see as a symbol of weakness, and made it powerful and fun. He often joked that if he didn’t wear a hat, no one would recognize him.

#### **3. Your joy was his joy.**

He was so genuinely proud of and happy for all his clerks and friends. He bragged about other people’s kids and shared their pictures like they were his own. How many times have we all experienced HP telling a complete stranger about some award a former clerk won, or a new job a clerk had taken, or something funny someone’s child did?

#### **2. His love for Bern.**

We all loved the way he loved Bern.

#### **1. His passion for humanity and his patriotism.**

Maybe it was his upbringing during the Depression or his war experience or his plight as a solo practitioner out there, trying to learn to practice law and make a living at the same time, but HP always rooted for the underdog. As chair of the Federal Defenders Advisory Committee, he constantly exhorted the federal defenders to focus on their job of keeping government power in check. His passion for protecting the little guy is burned into all of our hearts. In fact, many of us left our clerkship with this question always in our minds: “What would Harry do?”

Whenever he saw a wrong that needed to be righted, he would gather his law clerks and give this instruction: Find the law and build the right decision. He said the law is like going to Builder’s Emporium: Figure out what you want to build and then use the law as a tool to build it. He was collegial with his peers but uncompromising if he thought a decision could be used as a bludgeon against the disenfranchised.

He simply believed it was his job as a judge and as a patriot to make sure that his decisions upheld the promise written on the pedestal of the Statue of Liberty: “Give me your tired, your poor, your huddled masses yearning to breathe free.”

If we did not have that passion when we started with Harry, we left with a big dose of it at the end of the clerkship.

So how do we assess our time with Harry? With a phrase that we say often: Everything I learned about being a lawyer, I learned from HP. Harry was our hero, teacher, counselor, advocate, mentor, and friend. We are grateful that he prepared us for the world and for our profession. We honor our promise to take up the torch and spread his vision of what lawyers and judges should be doing. And just as Harry ended every conversation with an "I love you," we tell Harry today, "Judge, we love you."











### *Remarks of Paul Freese<sup>1</sup>*

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When the Pregerson family asked me to share a few reflections about Harry, I wanted to speak from my heart, and I thought hard about what I could say to honor this magnificent man. It occurred to me as somewhat ironic that for me, a Catholic and Christian, the person who most reminded me of Jesus was a Jewish man named Harry. And I mentioned this to my wife, Denise, my most honest critic, and she said, “No, you’re not going to say that. First of all, Jesus was a Jew, so you’re going to sound like an ignorant Catholic who doesn’t know his history. You’re not going to say that!” Her rebuke reminded me of those events honoring Harry, who had a tendency to go on, until Bern would pop up and say, “Harry, get down, you’re done, get off the stage.” God bless our wives.

I have had the extraordinary privilege over my twenty-plus years as a public interest attorney to see the magnificence that is Harry Pregerson both on and off the bench, during my time with public counsel and now with Neighbor Legal Services. I once heard someone say that in sports there are stars, there are superstars, and then there is Bo Jackson. In the field of law and public interest, there are stars, there are superstars, and then there is Harry Pregerson. Harry’s distinctive quality was that he was always preoccupied with bringing love to those who suffer: the unwanted, the unpopular, the outcast. All those whom society too often treats as invisible. Indeed, throughout his career, with his every fiber, Harry defied the forces that seek to render the suffering of our most vulnerable and unpopular invisible and irrelevant.

I first encountered Harry’s celestial fire one winter evening in 1994 when he appeared, decked out in cowboy hat and boots, to inspire and help train a large group of volunteer attorneys to conduct legal clinics at

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1. Paul Freese is Director of Strategic Partnerships & Innovation for the Human Trafficking Legal Network, a nonprofit dedicated to prevent and end the modern slavery of Human Trafficking.

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homeless shelters. Harry became involved with the homeless after he noticed that they were sleeping right outside the federal courthouse. He took action and made arrangements to allow them to sleep indoors to protect them against the cold and rain after hours. I was thinking, "Wow, this judge is pretty different, he sure is one cool cowboy." Well, his homeless activism did not endear Harry to all of his colleagues, but he parlayed the backlash he received into a campaign that ended up creating Bell Shelter as an alternative. Talk about an ingenious political ploy.

When Harry learned of a special program in San Diego where a judge would go to a shelter and hold court onsite to help the homeless clear tickets and warrants that interfered with their efforts to get back on their feet, he called me. "Paul we need to do this in L.A., and I want your help organizing a delegation to San Diego." Well, I am pretty sure you will all agree that one would've had more luck talking a dog out of a meat wagon than saying no to Harry Pregerson when he was on a mission. Public counsel organized the outreach for San Diego, and Harry loved this model. He loved how when the judge started the session, he assured all the homeless, who were feeling very nervous, "No one here is gonna go to jail today," and how a sigh of relief then decompressed the room.

Harry was so enthralled with the session that afterward he engaged in vigorous conversations with the judge, court officials, and the homeless participants, and he didn't want to leave. But we had a train to catch, and I was one of the organizers, so people were looking at me and saying, "Paul, you've got to corral Harry, you know we have to catch this train." "Judge," I said, "please, we really need to get moving; we can't miss our train." "Just hold on, give me a minute here, Paul," Harry said. But instead of making a move to leave, he even went back to his previous discussions. Everyone kept looking at their watches or pointing at me. "You need to detach Harry or we're really going to miss our train." So I tried again: "Judge we're really going to miss our train if we don't go. Please." He looked up, annoyed, but his eyes suddenly danced as he spied something behind me. "I've got an idea!" he exclaimed. Now, I'm sure you know that sly, mischievous look that would suddenly spark a light beneath the brim of his cowboy hat. Well, he suddenly wheeled around, and off he dashed toward a bus that was approaching on the highway. I noticed that the bus said "Out of Service." But there goes Harry to plant himself squarely on the highway right in the path of the bus, waving his cowboy hat and his cane to get it to stop. The next thing we know, Harry is talking to the bus driver, and now he's waving us over to pile onto the bus. Harry had invoked a little-known power of federal judges. Apparently, they can commandeer an out-of-commission bus. But we managed to reach the train on time, thanks to Harry's pluck, charm, and moxie.

Harry parlayed that session in San Diego into creating Los Angeles County's Homeless Court Program, which has helped lift up the lives of thousands. Jenny Durant remarked after watching Harry in action that day,

"You know, I really do believe angels occupy this earth, and I'm convinced Harry Pregerson is one." But we all know Harry was human. For example, he could be overly optimistic about what he could accomplish in a very short amount of time. He was once quite late for a presentation that he had asked Steve Ness and Bill Quicksilver to arrange with Manatt Phelps to pitch the idea of having them create a legal clinic to help homeless veterans. More than fifty attorneys were at the presentation, waiting for him. Well, Harry burst into the room and swiftly disarmed everyone. "Sorry I'm late!" he exclaimed. "But all of you here hereby have dispensation that if you ever make a late appearance in my courtroom, I will not hold you in contempt." He then proceeded to inspire the Manatt attorneys to initiate a robust legal clinic that has been going on for more than ten years and has helped countless homeless veterans.

Harry also spearheaded a major outreach effort to conduct a day of free legal services for the Marines and their families at Camp Pendleton. It was so successful that the commanding general personally wrote a thank-you commending Harry and the volunteers for—get this—"promoting mission preparedness by helping alleviate the stress that unresolved legal issues pose to our troops." Who knew that legal aid could promote military mission preparedness in defense of our country? But there's the Harry magic for you.

As we commend Harry to eternal rest, we reflect upon the quality of his monumental life. Not only on the bench or in his after hours, tirelessly helping others, but in his devotion to his family, including the help he provided to Dean and Sharon after the loss of their beloved David, Harry's grandson. We will not forget his fierce loyalty as a friend, his fidelity to decency and kindness, and his way of being ever the consummate gentle man to everyone. In these times, when headlines teem with examples of indecent behavior from people in power, Harry's embodiments of celestial grace offer a welcomed counterpoint.

Harry recognized that as devastating as material poverty can be, it is the disconnection from community of care that most oppresses our homeless. I'm convinced that this is why he devoted far more individual attention to the homeless and powerless than to the powerful and the elite. His message to the homeless was "You deserve more, and I believe in you. Don't give up on your dreams." The message he conveyed to the powerful was "You need to do more or I won't believe in you, because you'll be giving up on the dream of what we must be as a community."

My mother once remarked, "You know, Paul, everyone always says that we are all the children of God, but no one really lives that way." Well, we gather here today because we are blessed and forever moved to have known and been befriended by a man who did live that way until his dying breath, when he lamented his inability to help others.

Morris West wrote, "It costs so much to be a full human being that there are very few who have the enlightenment or the courage to pay the

price. One has to abandon altogether the search for security, and reach out to the risk of living with both arms. One has to embrace the world like a lover, yet demand no easy return of love. One has to accept pain as a condition of existence. One has to court doubt and darkness as a cost of knowing. One needs a will stubborn in conflict, but apt always to the total acceptance of every consequence of living and dying." Can you think of anyone who more powerfully embodies those virtues than Harry Pregerson, or indeed the entire Pregerson family? May his memory and their grace inspire us always. Thank you, Harry.



### *Remarks of Michael Feuer<sup>1</sup>*

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All of us here feel that we've lost a hero—a tough, tenacious, cantankerous, lovable hero. But Dean Pregerson admonished me that this was to be a celebration, and I shouldn't dwell on our loss. And in that spirit, I am sitting here listening to the wonderful stories and thinking that maybe there's just one element missing. Harry didn't like a lot of speechifying; he liked telling his own stories, but not a lot of speechifying. But what if we were all to, in just this moment, express through applause how we felt about Harry Pregerson, just for a second. So, Dean, that's a celebration, and now I think my work is done.

In this room are people whose political views, whose visions of the justice system, are very different from one another's. How rare is that? But those of us who knew Harry know that this was one of his magical gifts: he could always bring people together. How much do we need that right now—his ability to bring us together, to connect us, not just with the person next to us but with our own sense of purpose. That's what I think of when I think of Harry. You could be powerful, or you could be frail, Harry Pregerson would always find a way to connect with you. Detachment and distance were not his thing. And that's how he saw the law as well.

Harry obviously had a tremendous impact as a jurist, and I think this was for two reasons. One, he personified idealism. The law was there to protect people, it was infused with values, equality, and fairness. But he also was the consummate pragmatist. He measured the justness of something based on its actual effect on real people's lives.

One of my first jobs was as director of Bet Tzedek, a free legal services provider for low-income individuals. My predecessor in that job was Terry Friedman, who argued a case before a Ninth Circuit en banc panel that included Harry Pregerson. The underlying facts of the case were that a woman named Felicia Grunfeder had escaped from the Warsaw Ghetto as a

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1. Michael Feuer is the Los Angeles City Attorney



child, hidden in a coffin. In recent years, the government of Germany had made reparation payments to Holocaust survivors. The issue before the court was straightforward: Should a Social Security Disability recipient have her payments reduced or eliminated on account of her other income? The district court and a three-judge panel both said yes<sup>2</sup> Judge Pregerson, writing for the en banc court, said no, reciting the background of the payments. Harry wrote the opinion, and I know that opinion really mattered to him.<sup>3</sup> For Harry, this was the essence of what the justice system could do.

For most of us, Harry transcended what we think of when we think of just people. Harry was a force of nature and always on a mission. No one could say no to Harry Pregerson—okay, maybe the U.S. Supreme Court occasionally—but most people had a very hard time saying no to Harry Pregerson, and the world is a better place for that. I'm one of those guys who couldn't say no to Harry. I remember getting a phone call when I was at Bet Tzedek: "Hey, Michael, there's a shelter we're establishing for homeless families in a park in Westwood. You ought to send your lawyers there to help those families." I started to explain how overtaxed our staff was, and I got a few words out, but I quickly realized how pointless my protesting was...and, of course, we went and helped people at that shelter. But that precipitated another phone call: "Hey, Michael, there's this shelter in Bell for homeless people. You should start sending Bet Tzedek lawyers at night to that shelter to help those people." I didn't even bother to protest that point. I was all in.

How many of us got phone calls just like that? My wife once called Maria Stratton to tell her she had just been "Harry'd"—shorthand for receiving a call from Harry telling you you've got to do something. It was an infectious quality that all of us became familiar with over the years, whether it was hiring somebody Harry wanted you to hire, or going to this or that event, or participating in a celebration, or changing the world somehow. This was what Harry Pregerson was all about.

Harry treated me like I was a relative, and I easily could've been given how similar our backgrounds were. My mom grew up in East L.A. in Boyle Heights, and, like Harry, she went to Roosevelt High School. She brought me up with a vision of social justice that could only have come from growing up in a neighborhood where the fabrics of people's lives—rich, poor, every race, every religion—were so deeply entwined. Harry was seriously wounded on Okinawa. My dad was injured when he parachuted from a plane that was shot down by the Nazis, and he was taken to the Stalag 17 prisoner-of-war camp and barely survived. Harry and Bern raised Katie and Dean to believe that our greatest reward and fulfillment come from what we can do for somebody else. That is exactly how I was raised, too.

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2. *Grunfeder v. Heckler*, 708 F.2d 458 (9<sup>th</sup> Cir. 1983).

3. *Grunfeder v. Heckler*, 748 F.2d 503 (9<sup>th</sup> Cir. 1984) (en banc).

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Harry and I clicked from the start. When I won a city council race I had no business winning, Harry swore me in. I'm sure he did that for many others of you too, as well as presiding over your marriages and other important life events. Once you were in Harry's orbit, an orbit with a powerful gravitational pull, there was really no way to escape it.

As we reflect on the life of this extraordinary, larger-than-life man who left such an indelible mark on so many people, we are challenged to ask ourselves what we are doing that really matters. Around this room I am sure people are thinking, "I'm trying my best." And if Harry were here, I'm sure he would respond by saying, "Try, try a little bit harder."

Our thanks to the Pregerson family for sharing with us one of the most remarkable people we will ever meet. There is tremendous love in this room, and it is love for Harry, and it is love for you. Thank you very much.



## Book Reviews

***Bayonets in Paradise: Martial Law in Hawai'i During World War II*, by Harry N. Scheiber and Jane L. Scheiber. Honolulu: University of Hawai'i Press, 2016. 488 pp.; notes, index; \$45.00, cloth.**

The serious nature, tight focus, and comprehensive research of *Bayonets in Paradise* is evident even at first glance. A weighty book in every respect—it has seven parts, eighteen chapters, thirty-four photographs, and more than a hundred pages of endnotes—the Scheibers' work is an authoritative analysis of Hawai'i under nearly three years of martial law during World War II. It makes explicit the connections between the "arbitrary and capricious" actions of the United States in Hawai'i during the war and the actions of the twenty-first-century U.S. government in response to terrorism (4). Its cover photograph depicts a soldier, the bayonet of the book's title fixed on his rifle, standing next to a "STOP" sign in front of the Iolani Palace in Honolulu. Historians who are teaching or writing about U.S. legal and political history should stop and consider *Bayonets in Paradise's* critical lessons on civil liberties and wartime if they are thinking of omitting the experience of Hawai'i. The United States justified its rigid military rule over more than four hundred thousand residents of Hawai'i, regulation and incarceration based on race and ethnicity, and sweeping social and economic regulations by calling it a "military necessity," which the Scheibers reveal to be thin cover for bias and fear.

Decades of archival research, both in Hawai'i and on the mainland, some of it possible because of newly released government data, ground the book's vivid descriptions. Readers learn the career trajectories and attitudes toward racial and ethnic equality of both the FBI agents who planned for the possibility of war with Japan prior to the attack on Pearl Harbor and the military officers who ruled under martial law. The Scheibers also mine the Hawai'ian press for a deeper understanding of how anti-Japanese sentiment appeared and was countered by civic and business leaders who sought a "united citizenry" (28). And the correspondence of judges, civil servants, and military officers reveals the sometimes-tortured logic and uncertainty of the leaders who tried to navigate the conflicting goals of national security and civil rights in the multiracial, fortified Hawai'ian Islands.

The Scheibers elaborate the plight of such ethnic groups as the Kibei, a subset of the Nisei (second-generation Japanese immigrants). The Kibei were dual citizens whose families had sent them back to live and study in

Japan in their youth, after which they returned to the Islands. Even after many volunteered to serve as interpreters and translators for the U.S. military, the Kibei with their sometimes-limited English-language skills and Japanese education were deemed suspicious by the military intelligence agencies working to root out disloyalty (170). The impossible situation they faced in loyalty interrogations comes to life in the sources the Scheibers mined, including detailed questionnaires administered by the War Relocation Authority at the Tule Lake segregation center.

In analyzing the origin and disposition of the habeas corpus cases that challenged martial law, the Scheibers unpack the complexities of legal reasoning in a canonical Supreme Court case, *Duncan v. Kahanamoku*, in which the case of a civilian shipyard worker convicted of assault was combined with that of a Honolulu stockbroker convicted of embezzlement in the provost courts. They also tackle the complexities of judicial disposition and legal reasoning in less well known cases such as *Spurlock*, in which a war worker was pardoned by the army after serving three years of a five-year sentence imposed by a provost court. *Bayonets in Paradise* pulls no punches in pointing out how many constitutional safeguards were disregarded on the grounds that Hawai'i was a "fortress" in which every aspect of civilian life was part of the military effort (212). The legal regime on the islands during the war was "arbitrary and capricious" because of its "wholesale and wanton disregard of constitutional liberties" (4).

Perhaps the greatest strength of *Bayonets in Paradise* is the depth of context in which its legal and political arguments are situated. Recognizing that martial law in Hawai'i has been characterized as a more even-handed, less racist approach than the Japanese internment that took place on the mainland during the war, the Scheibers reveal that the racial biases that motivated the now-discredited internment policy were also at the root of the planning and execution of Hawai'i's military government. They take the legal positions of the military governor who took control of the Hawai'ian Islands' entire civilian population and trace them to a perceived "Japanese problem" (10) that led U.S. planners in the 1920s to respond in fear to the large population of Japanese immigrants. This deep awareness of historiography, combined with a keen sense of contemporary politics, makes the Scheibers shrewd observers of, and superb guides through, the contested racial and political terrain of Hawai'i during World War II.

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*President, Mills College, Oakland, CA*

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**Fraud: An American History from Barnum to Madoff, By Edward J. Balleisen. Princeton & Oxford: Princeton University Press, 2017. 479 pp.; Notes, Index; U.S.\$35.00, Cloth**

**Spoiler Alert:** You need this book. If you are an American, or person of other national persuasion, who has more than a passing interest in American history, political economy, legal history, consumer rights, regulatory evolution, or criminal law, you will want it. I admit to enchantment, from the first pages onward, with this survey of American fraud, as perpetrated by a parade of swindlers, sharpsters, and confidence men—and its depiction of the societal, economic, and regulatory milieus in which they flourished and were brought down. This work does more than illustrate and gratify our half-guilty fascination with fraudsters and their schemes, and their ability to entertain us even as they swindle us—or preferably others. It presents the sociological/psychological insights of the ideal huckster, P.T. Barnum, who described his early 19th Century world as a Hobbesian, dog-eat-dog society in which cheating was expected, cultivated, and admired, and in which caveat emptor was both a necessity of economic survival and a near foolproof legal defense against the imprecations of those who got the short end of any deal.

The educational as well as the entertainment value of this odyssey of fraud is enhanced by numerous accounts, in each era, of many lesser-known, albeit typical, scams and swindles. I was particularly enchanted with a ladies-only fraud perpetrated by the enterprising Sarah Howe, operating in a Gilded Age explosion of phony banks, brokerages, and investment schemes, whose Ladies' Deposit Savings Bank offered thrifty young women the opportunity to double or triple their money within a year. As Professor Balleisen recounts, "Howe claimed that a bequest by wealthy Quakers had created a surplus fund from which to pay interest to thrifty single females." (p. 18). It wasn't a Bank, and Howe ran off with the Deposits. Fraud is studded with dozens of such examples of little-known frauds that proliferated, each in accord with the economic and social concerns and anxieties of its era.

One of the repeated lessons of this book is that of societal and economic context: the frauds that victimize us evolve and adapt to reflect the state of our economy and the priorities of society. What sets this book apart from other character studies of colorful reprobates is that it is more than a mere chronologically arranged series of anecdotes; it demonstrates the "persistence in flim-flammy", and of efforts to deter and prevent it. We are treated to recurring schemes that return, like (defective) clockwork, to fleece us over and over again. The Ponzi (or Pyramid) Scheme reappears as

multi-level marketing; the “pump and dump” recasts itself as short-selling; and “old swindles in new jargon” (an epithet first coined in the 1880s) emerge and re-emerge. As technologies change, and the economy shifts, fraud is recast in new variations on old themes, to take advantage of the general confusion of transitional eras, and operate in the shadow of true innovation and entrepreneurship.

Where is the sometimes fine line between innovation and swindle? Where does mere “puffing” end and true fraud begin? The answers are not easy, and Americans have struggled with them since the beginning of the nation. This book divides its tale persuasively into definable eras, with each its dominant frauds, and defining characters. Particularly detailed and lively is the discussion of the “Nineteenth-Century World of Caveat Emptor (1810s to 1880s)”, in which Barnum thrives, and Herman Melville writes, in addition to that book about the whale, his era-defining The Confidence Man.

From here, Professor Balleisen moves to the post-Civil War period, a section captioned “Professionalization, Moralism, and the Elite Assault on Deception (1860s to 1930s)”. This is when a nascent Sears, Roebuck and Co., which Americans revere for their childhood memories, ran into trouble with the U.S. Post Office. Its quintessentially reliable “Wish Book”, was branded as “Fraudulent” by the Post Office, intent on suppressing what it considered to be an illegal lottery. Sears? Gambling? Well, it seems that Sears was actually selling shoes for \$2.75 per pair, but along with those shoes came a chance at a \$500 piano, or, failing that, a \$50 gold watch, if one were the first (or at least the first in one’s state) to return the order. Needless to say, orders poured in, and everyone got ... shoes, albeit shoes that Richard W. Sears insisted were “worth nearly three times the price asked.” Thus colorfully does the author present the Post Office’s invention of mail fraud, with Sears a notable early perpetrator - or fall guy.

As the nation grows geographically and progresses technologically, we move into the Post-Depression era, with its “Call For Investor and Consumer Protection (1930s to 1970s).” The book ends, essentially where it began, in another laissez faire period as “The Market Strikes Back” (1970s to 2010s). This final section includes analysis of the Savings and Loan Crisis of the 1980s, and ends with a survey of renewed efforts toward regulation and reform in the wake of the 2008 recession. As it moves toward the present, and away from “history”, the book grows more generally descriptive of broad trends, less specific, and for this reader, less evocative- but that is the way of the near-present; it does not yet hold the more exotic fascination of the past.

While pictures of the eponymous Ponzi schemer, the recurring commentator P.T. Barnum, and Bernard Madoff grace the book’s dust jacket and their stories regale us briefly, none of their larcenous activities are detailed in great depth here. There are, or will be, other books that do this. The liberally supplied end- notes provide a wealth of additional detail and references to reward further excursions. Balleisen’s work is both a

comprehensive survey of fraud and a discovery and dissection of the recurring themes in each age's swindles that continue to characterize the American economic and social experience. We look upon these with equal parts chagrin (if we are among the victims) and schadenfreude (when observing the victimhood of others).

As a lawyer whose professional career has been largely devoted to the representation of victims of financial and consumer fraud, I must admit the book calls out that not-so admirable tendency to grudgingly admire the astounding audacity and imperious self-confidence of those rascals who continue to purloin our own misplaced confidence. Caveat emptor: you will enjoy this book immensely. More reliably than Sears' shoes, it is easily worth many times the price asked, and you will learn from it. Fraud's moral, regulatory, legal, and political lessons go down as easily as a dollop of Dr. Humbug's finest patent medicine-with none of the unfortunate side effects.

*Elizabeth Cabraser*  
*Lieff Cabraser*  
Heimenn & Berstein

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***Killers of the Flower Moon: The Osage Murders and the Birth of the FBI*, by David Grann. New York: Doubleday, 2016. 338 pp.; notes, bibliography; \$28.95, cloth.**

Bidding wars, oil magnates, bootleg liquor, shootings, poisonings, house-demolishing explosions, conspiracies, cover-ups, bribed officials and juries, plot twists, a motley crew of lawmen, and the classic lawman-versus-bad-guy theme: David Grann's telling of the Osage murders of the early 1900s, in which dozens and potentially hundreds of Osage Indians were killed over two decades, has the makings of a dramatic Hollywood movie with the added allure of being "based on a true story."

Grann skillfully weaves together an engaging, descriptive narrative that follows the story in a mostly chronological fashion, with detours for the backstories of important characters. The structure works, even if the extended sidetracks sometimes tend to slow the pacing, as is the case with the central law enforcement character, Tom White, who has thirteen pages of personal history devoted to him. White was a former Texas Ranger sent by Hoover to look into the killings, and his investigation resulted in the only prosecutions connected with the Osage murders.

The Osage exercised agency in choosing where their reservation would be in the late 1800s, even as the U.S. government forced them to leave their ancestral lands around Kansas. They picked a location in Oklahoma that their leadership believed would not be attractive to white people due to its classification as poor-quality farmland, unaware that their chosen site was on top of oil reserves that would bring in many wealthy industrialists and quite a bit of their money. The money drove unscrupulous people to do terrible things in Osage County, Oklahoma, many of which were never recorded as crimes, much less solved with the perpetrators brought to justice.

The subtitle of the book references the birth of the FBI, but this is slightly misleading. While Tom White was in fact an agent of the Bureau of Investigation before it was the FBI, and while his status as a federal agent protected him from the local politics and the use of money and influence that stymied all previous investigations into the murders, the connection between White's work and the formation of the FBI as a fully sanctioned agency in the 1930s is not explored as fully as it could have been. Grann notes that the agency was in disgrace when J. Edgar Hoover took command and that the successful prosecution of some individuals who were connected to the Osage murders—which Hoover ensured was publicized to his personal benefit—assisted in keeping the agency alive when its future was in question. As presented here, it seems likely that Hoover might have been removed from his position at the agency if the Osage investigation or

prosecution had failed. Further, it wasn't the Osage case that convinced the country's leadership that the FBI was necessary, with "a sweeping mission" and a federal "comprehensive criminal code" to enforce. According to Grann, it was instead the Lindbergh baby's disappearance and the Kansas City Massacre that cemented the FBI's future.

Grann's research for the book was extensive; he devotes two pages to listing the types of sources he used and includes eleven pages of selected bibliography. There are many endnotes for readers interested in following up on Grann's research. They are not numbered for easy use but rather organized by page number and catchphrase from the text.

There is a darker undertone to this American-history tale that might make many viewers of the Hollywood version uncomfortable: the pervasiveness of systemic racism directed against Native Americans and used to rationalize hundreds of murders over the course of decades in the quest to steal their money. Grann quotes an Osage who said in 1926 that the question the jury must consider is not whether the accused is guilty of murder: "The question for them to decide is whether a white man killing an Osage is murder—or merely cruelty to animals."

The most effective part of the book, and the part for which Grann deserves the most credit, is his bringing to light of possibly hundreds of unsolved murders, all previously covered up by an unofficial coalition of thieves and murderers that included the entire white society of Osage County: "Virtually every element of society was complicit in the murderous system," writes Grann. The Osage lived in fear, and they are still affected by the murders. *Killers of the Flower Moon* highlights how difficult it can be to speak up for positive change in a system in which one group is repressed or attacked for the benefit of another group—and also how very important it is that those who can speak up do so.

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