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JOHN T. NOONAN, JR.: RENAISSANCE MAN IN THE CATHOLIC TRADITION

*Norman Dorsen**

One need not strain to find John Noonan described in superlative terms. Dr. Richard John Neuhaus, a leading Lutheran theologian, cites him as "one of the towering figures of our time."¹ *Newsweek* magazine describes him as "[u]niquely gifted as a moralist, historian and lawyer . . . [who] challenges American jurisprudence with a rare humanistic vision."² A Justice Department lawyer, at the time Professor Noonan was nominated to be Judge Noonan, exuberantly proclaimed him "one of the five smartest guys in the world."³

I do not require such testimonials to reach the same conclusion. In our very first encounter, in the fall of 1952, I found myself as a third year editor of the *Harvard Law Review* editing the draft of a case-note that John, a second year editor, had prepared. *Harvard Law Review* editors then (and perhaps now) were not noted for their modesty, and I approached the edit with typical confidence. That is, I expected to turn the draft inside out, reorganize it, and rewrite most sentences before sending it on to the case editor for a final "touching up." Imagine my amazement, and wounded pride, when I found that John's draft was precisely organized, written beautifully and economically, and that he was able to explain every point and parry every thrust of my questions. The last straw occurred after I finally managed to break into his draft with a suggestion that required some work. Instead of starting to rewrite on the spot, although it was almost ten p.m., as was the *Review* custom, John said that he had a party to go to,

* Stokes Professor of Law, New York University School of Law. President, U.S. Association of Constitutional Law. President, American Civil Liberties Union, 1976-1991.

1 See John W. Donohue, *Of Many Things*, 154 *AMERICA*, at Feb. 8, 1986, at inside cover.

2 Kenneth L. Woodward, *Noonan's Life of the Law*, *NEWSWEEK*, Apr. 1, 1985, at 82.

3 Ezra Bowen, *Judges with Their Minds Right: The President Pushes for Conservative Control of the Bench*, *TIME*, Nov. 4, 1985, at 77-78.

but also said, "don't worry, I'll have this wholly revised by early next morning." And he did, brilliantly.⁴

That edit began a lifetime friendship between us, carried forward when in 1954–1955 we shared a bachelors' house with several other young lawyers in Alexandria, Virginia, while John was working at the National Security Council and I was doing duty in the Pentagon. A few years later I submitted a book review⁵ to him when he was editor, at Notre Dame Law School, of the *Natural Law Forum*.⁶ In the mid-1970s, Harriette and I spent some quality time with John and Mary Lee while I was a visitor at his law school, by then the University of California at Berkeley. There have been many other professional and social interactions.

Throughout the years, I was conscious of John's scholarship and other achievements. Several of his books are classics: *The Scholastic Analysis of Usury*,⁷ *Contraception*,⁸ *Persons and Masks of the Law*,⁹ and *Bribes*.¹⁰ In *Contraception*, after a meticulous study of how Catholic theologians and canonists treated the subject, Noonan concluded that "there is nothing in the authoritative teaching of the Church on contraception which would prevent a considerable modification of the existing rule."¹¹ So taken was I with *Contraception* that I handed the copy that John had sent me to Robert F. Kennedy, who had recently been elected a Senator from New York. (This was an ingenuous attempt on my part to suggest to Kennedy that he think like a liberal Catholic on such issues.) The full list of Judge Noonan's books and articles, special lectureships, important consultancies, and honors is awe-inspiring. That he is not above error, however, is illustrated by his optimistic prediction, in 1985, that "hard-core bribery . . . will go the way of slavery."¹²

4 The product may be found in Casenote, *Restraint of Trade—Monopoly—Infringement Suit Brought to Further Monopolistic Plan Invokes Treble-damage Liability Though Based on Probable Cause*, 66 HARV. L. REV. 541 (1953).

5 Norman Dorsen, *Political Justice: The Use of Legal Procedures for Political Ends*, 8 NAT. L.F. 166 (1963) (book review).

6 This journal is now the *American Journal of Jurisprudence*.

7 JOHN T. NOONAN, JR., *THE SCHOLASTIC ANALYSIS OF USURY* (1957).

8 JOHN T. NOONAN, JR., *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIAN AND CANONISTS* (1965).

9 JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON AND WYTHE AS MAKERS OF THE MASKS* (1976).

10 JOHN T. NOONAN, JR., *BRIBES* (1984).

11 *Contraception: An Interview with John T. Noonan, Jr.*, 203 CATHOLIC WORLD 153, 155 (1966).

12 *A Conversation with John Noonan, "Hard-Core Bribery Will Go The Way Of Slavery"*, U.S. News & World Rep., July 8, 1985, at 64.

At the core of Judge Noonan's work and life is his devout adherence to the Roman Catholic faith and Church. He has served, inter alia, as a consultant to a Papal Commission, as a governor of the Canon Law Society of America, and on at least three Bishops' committees. His books, articles, and book reviews, while roaming confidently over many fields of knowledge, are often linked to topics and interests related to the Church. At least a dozen Roman Catholic universities and colleges here and abroad have awarded him honorary degrees as well as other notable honors.

Since January 1973, when *Roe v. Wade*¹³ was decided, there has been no issue that has engaged Judge Noonan as thoroughly as abortion. He was well primed, having published frequently on the subject prior to the *Roe* decision.¹⁴ Afterwards, other articles and books appeared. These had a sharp bite, reflecting John's dismay, not only with a result that he regarded as anti-life, but also with Justice Harry Blackmun's opinion for the Court, which he derided as "mock[ing] the people with the doctrines of technocratic elitism."¹⁵ John went so far, in the first turbulent weeks after the *Roe* ruling, to call for expansion of the Supreme Court from nine to fifteen members and for a Human Life Amendment to the Constitution to undo the decision.¹⁶ He later withdrew his recommendation that the Supreme Court be expanded.¹⁷

As a pro-choice advocate who argued the first abortion rights case in the Supreme Court¹⁸ and assisted in preparing the prevailing brief in *Roe v. Wade*, I naturally do not subscribe to Judge Noonan's views on this subject. However, I have never doubted the deep vein of principle and faith from which he approaches the issue. Nor have I failed to notice that, unlike many other anti-abortion champions, he has extended his mantle of caring beyond abortion to the "infant suffering from genetic deficiencies, the retarded child, the insane or senile adult"—all of whom would have been defended by his proposed

13 410 U.S. 113 (1973).

14 E.g., *THE MORALITY OF ABORTION* (John T. Noonan, Jr. ed., 1970); John T. Noonan, Jr., *Abortion and the Catholic Church: A Summary History*, 12 NAT. L.F. 85 (1967); John T. Noonan, Jr., *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION*, *supra*, at 1; John T. Noonan, Jr., *The Constitutionality of the Regulation of Abortion*, 21 HASTINGS L.J. 51 (1969); John T. Noonan, Jr., *Deciding Who Is Human*, 13 NAT. L.F. 134 (1968).

15 John T. Noonan, Jr., *The Right to Life: Raw Judicial Power*, 25 NAT'L REV. 260, 264 (1973).

16 *See id.*

17 *See Anti-abortion Activist up for Major Court Post*, SAN DIEGO UNION-TRIBUNE, Sept. 14, 1985, at A4.

18 *United States v. Vuitch*, 402 U.S. 62 (1971).

Human Life Amendment.¹⁹ Equally telling of his intellectual consistency has been his willingness as a judge to “anger[] conservatives with outspoken declarations on behalf of death row prisoners seeking stays of execution and further court hearings”²⁰ and to intervene in a high visibility capital case where procedural irregularities threatened the integrity of the process.²¹

As a judge, Noonan has been sensitive to the plight of other vulnerable groups. For example, he has written several immigration opinions supporting aliens, including one case in which he broadened the circumstances under which refugees can seek political asylum in the United States.²² He also joined a controversial opinion in 1989 that took account of evidence that the CIA routinely denied security clearances to homosexuals and, therefore, refused to bar a challenge to the agency’s practice on a case by case basis.²³ Appraising his overall record, a prominent liberal described Noonan as “characteristically independent, fully aware that, although he must follow the law, he is not required to abandon his conscience.”²⁴

One of Judge Noonan’s finest hours was an early indication that he would not “abandon his conscience” under pressure. In the summer of 1953, when the results from June examinations at Harvard Law School became known, they showed that Jonathan Lubell, a first year student, had earned a place on the *Harvard Law Review*, at that time an honor based exclusively on grades. But Lubell had a problem. While an undergraduate at Cornell University, he had become involved in a Marxist study group and had distributed the *Daily Worker* on campus. When the Senate Subcommittee on Internal Security called Lubell before it to describe his activities and to name other members of his group, Lubell refused to testify on both First and Fifth Amendment grounds. Dean Erwin Griswold,²⁵ who had earlier told

19 Noonan, *supra* note 15, at 264.

20 Peter Steinfelds, *Beliefs*, N.Y. TIMES, Feb. 19, 1994, at 9.

21 See *Gomez v. United States Dist. Ct.*, 966 F.2d 460, 461 (9th Cir. 1992) (Noonan, J., dissenting).

22 *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987), discussed in KAREN MUSALO, REFUGEE LAW AND POLICY: CASES AND MATERIALS 292-301 (1997).

23 *Dubbs v. CIA*, 866 F.2d 1114 (9th Cir. 1989).

24 Nat Hentoff, *Anybody Here Really Believe in Free Speech?*, THE VILLAGE VOICE, Nov. 30, 1993, at 24-25.

25 Shortly thereafter, Dean Griswold undertook a comprehensive study of this sort of issue, culminating in an important book, ERWIN N. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955), which defended those who invoked the privilege. When Jonathan Lubell was finally permitted to apply for the New York bar in 1958, Griswold supported his application.

Lubell and his brother²⁶ that they had to cooperate with the Subcommittee, summoned the president of the *Harvard Law Review* for the purpose of excluding Lubell, which required a vote of the carry-over editors entering their third year of law school.

The editors duly convened and debated the issue; afterwards a majority, including several who viewed themselves as liberals, voted to bar Lubell.²⁷ Voting in the minority, against the dean and against the ethos of the time, was John Noonan.²⁸ This was a courageous position because there were significant career risks for anyone who could be viewed as sympathetic to Communists or even leftists.²⁹ As I came to know Noonan better and discussed this matter with him, I came to understand that his conscientious action stemmed from a depth of character that could not be swayed by the prospect of personal risk.

It should be obvious by now that John Noonan is no ordinary man. A "historian . . . at home in any legal system, ancient or modern, continental or American, ecclesiastical or civil,"³⁰ he is without peer among contemporary legal scholars, combining an intellectual brilliance that a few may share with an unmatched range of knowledge—seven languages and close familiarity with biblical and classical studies and with English literature. When one combines these powers with a gracious courtliness and a practical sense honed during five years of legal practice, the result is a renaissance figure without parallel in today's legal world.

26 Jonathan's twin brother, David, also was called before the Subcommittee and also had trouble at Harvard Law School. As I recall, he was denied a place in the Legal Aid Society, which his first year grades had earned him.

27 Monroe H. Freedman, *John T. Noonan, Jr.: Exemplar of Ethical Conduct*, 11 J.L. & RELIGION 229, 233 (1994–1995).

28 *Id.* at 232–33. While I was generally aware at the time of the events relating to the exclusion of Jonathan Lubell from the law review, having left Harvard Law School only a month or two prior to the action, I have relied on Professor Freedman's article for certain details.

29 *Id.* at 234.

30 Woodward, *supra* note 2, at 82.

