



IN MEMORIAM

John Thomas Noonan Jr.
Milo Rees Robbins Professor of Law, Emeritus
UC Berkeley
1926 – 2017

John T. Noonan Jr., a renowned scholar of remarkable vitality and moral purpose, a distinguished federal appellate judge, and an internationally influential Catholic layperson, died at his home in Berkeley on April 17, 2017, at the age of 90. He is survived by his wife of 49 years, the former Mary Lee Bennett, three children, John K. Noonan (Dixie), Rebecca Murray (Stuart), and Susanna Howard (Jim), seven grandchildren, and a sister, Mary Sabin.

John Noonan was born on October 24, 1926, in Boston, Massachusetts, and grew up in nearby Brookline. In 1944, he graduated from Harvard College, which was on a wartime schedule, in two and a half years. He then spent a year at the University of Cambridge; earned an M.A. (1949) and Ph.D. (1951) in philosophy from Catholic University of America; graduated in 1954 from Harvard Law School, where he was book review editor of the *Harvard Law Review*; served a demanding year on the staff of the U.S. National Security Council; and then practiced law for six years at his father's Boston firm. As a young lawyer, he had a formative experience as the elected chair of the Brookline Redevelopment Authority when it was the center of intense political conflict. He joined the law faculty at the University of Notre Dame in 1961, where he was editor of the highly regarded *Natural Law Forum*. Noonan came to Berkeley as a visitor in 1967 and was appointed professor of law that year. During almost 20 years on the faculty, he taught courses on professional responsibility and the role of lawyers, jurisprudence, and legal history, and was, among other interdisciplinary activities, chair of the Program in Religious Studies and the Committee on Medieval Studies.

In 1985, he became emeritus after President Ronald Reagan appointed him to the United States Court of Appeals for the Ninth Circuit, sitting in San Francisco. He served for 31 years on that court, his last opinion being published in December 2016. He heard oral argument in 3,459 cases and authored 1,080 opinions, dissents, and memoranda decisions, all written by him in longhand on yellow pads.

Among his many important opinions is a ground-breaking 1987 decision, *Lazo-Majano v. Immigration and Naturalization Service*, holding that a politically motivated sexual assault could be the basis for asylum for the victim. His 1995 decision, *Compassion in Dying v. State of Washington*, holding that Washington's ban on assisted suicide was not unconstitutional, was affirmed by a unanimous U.S. Supreme Court. In 1999, he wrote a dissent in *United States v. Kyllo*, arguing that police use of a thermal imaging device to monitor a defendant's home without a warrant violated the Fourth Amendment. In a 5-4 decision, the Supreme Court agreed with Noonan. In a controversial case in 1990, Noonan, sitting alone, issued a stay of execution for Robert Alton Harris, who was scheduled to die in California's gas chamber. He held that Harris was entitled under the Constitution to a hearing on whether he had received competent psychiatric assistance during his trial. Ultimately, the Supreme Court allowed the execution, the first in California in 25 years. In an unusual action for a federal judge, Noonan wrote a scathing indictment of the Supreme Court's decision in an op-ed for the *New York Times*.

Noonan's scholarly writing was prodigious, wide-ranging, and accessible. It was driven by beliefs in the importance of history, the moral importance of the subject itself, and the moral relation between scholar and reader in developing understanding. His first book, *The Scholastic Analysis of Usury* (1957), was the product of his dissertation; it focused on the process of development of moral, legal, and Church doctrine over time, setting something of a model for his later work. He wrote books on an impressive array of subjects, including abortion, contraception, euthanasia, marriage, divorce, religious freedom, slavery, bribes, the Magna Carta, and Shakespeare.

Noonan's 1965 book, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists*, was a turning point in his early career. It led to his appointment by Pope Paul VI as a consultant to the Papal Commission on Birth Control, which was at work in Rome at the time of the Vatican Council. This established him as a prominent Catholic layperson and led to his friendships with leading Catholic intellectuals. Brightly illuminating as all of his scholarship is, the book found contraception doctrine to be older, more nuanced, and less stringent than what had been generally thought. Although the liberal recommendations of the Noonan majority on the commission were not adopted, they have been influential.

Persons and Masks of the Law (1976) is Noonan's most intensive essay in jurisprudence. Quite appropriately, since it is concerned with the human beings behind formal systems of rules, it is deeply revealing of Noonan's fundamental commitments to persons, their relationships, and to the power of historical understanding and candid thinking in promoting them. *Persons* illustrates the importance of the individuals who make and apply law as judges, help make it as lawyers, and are affected by it as litigants. The book takes its place in a never-ending history dating back to Aristotle of jurisprudential thought and judicial decisions exploring the tensions between formal rules, abstract principles, and structured roles on the one hand, all of which are necessary, and, on the other hand, the essential demands of humanity and the effects of laws on individuals in a context of social and moral realities. The book can be considered radical in its systematic argument that rules and the legal and social

constructs that mask the humanity of participants are unduly dominant in legal thinking and legal education. Certainly, it is a legal philosophy quite at odds with that of the government that later appointed him to the federal bench. Writing some years later, he summed up his view of the personal in judging: “Americans are blessed with a much fuller literature on their judges’ lives, reflecting, I believe, an American appreciation of the truth that the law a judge makes is a projection of values that are inescapably personal – even while the judge labors to be impartial between the litigants and objective in his framing of the dispositive legal rule.”

The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams (1977) was first intended to be an illustrative chapter in *Persons and Masks of the Law*, but became a separate and powerful case study of how the American legal system used the mask of property to conceal and obliterate the humanity of enslaved Africans and their descendants. The book follows the capture of the slave ship, *The Antelope*, and examines not only the decisions by United States courts, but also what happened to the people aboard the ship, both during and after their detention.

Bribes: The Intellectual History of a Moral Ideal (1984) has been called Noonan’s masterpiece. The book shows that in early society the aim of giving gifts to powerful strangers was to elicit reciprocity and create social coherence. There was no crime of bribery. Instead, the wrongdoer was the powerful person who accepted gifts but did not grant the favors they were meant to engender. Noonan examines the social, theological, and psychological implications of bribes, focusing on historical instances of persons giving and receiving bribes, rather than on rules that abstractly define ‘bribery.’ He concludes that a bribe is a breach of the fidelity that alone distinguishes public office from raw power.

Central to everything in Noonan’s life were his family and his Catholic faith and connections to the Church. No account of his life, however brief, can omit the central importance of Mary Lee Noonan. An art historian, she was his partner in every aspect of his life. Their relationship to each other and their family life were remarkably happy.

A man of traditional tastes, Noonan was nevertheless a lifelong adventurer. At the start, he took a year at the University of Cambridge simply to read, travel, socialize, and interview the likes of T.S. Eliot and George Santayana. He devised a curriculum of personal tutorials in Catholicism with distinguished mentors to prepare himself for the Ph.D. program in philosophy; took a Ph.D. even as he knew he was destined for law; always sought out the most daunting thinkers. An appellate judge, he volunteered to sit as a trial judge, a challenging task, in order to understand the whole system better. He followed his humane interests all the way through to publishing books on whatever they led to, including writing on Shakespeare near the end of a lifetime in law. His close personal and intellectual relationship with his older Law School colleague, David Daube, a towering figure in Jewish and Roman law, must have been an adventure in itself to the scholar of Church law. This was a pattern of seeking out challenges necessary for a man who trusted his considered convictions. This particular kind of trust in oneself is a form of integrity.

Integrity defined John Noonan: integrity, in that he lived and acted as virtuously as one can ask of fallible human beings; and integrity in the sense of the integration of one's self across all of life's various roles and interests. He internalized the Catholic ethics and social teaching that absorbed him throughout his adult years, he acted on his beliefs, and he trusted his convictions. As a judge, he treated the individuals who were litigants and lawyers as persons. His concern for persons informed his judicial sympathy for immigrants. His opposition to abortion was principled, not political, and was coupled with adamant opposition to the death penalty. Slavery, the ultimate denial of personhood, haunts much of his work. He taught ethics and insisted on ethical behavior from the lawyers in his court, his students, his law clerks, and the government officials in the lawsuits before him. His judicial opinions were issued under his name and so he, never his law clerks, wrote them. If issues arose that he thought were important, he would pursue them in scholarship. His delight in friendship was inextricable from his delight in intellectual discourse and both, as well as his profound commitment to family, were inextricable from a belief in the pervading presence of goodness.

Perhaps, then, the key to John Noonan's remarkable capacity to integrate and so actively realize all aspects of his life, from family, to social life, to educating us, to work, to moral well-being, is that he took himself seriously — not as ego or in some frivolous sense — but because it was his responsibility to take his endowments seriously as a person, as a locus of the love that he believed animates everything.

Robert H. Cole
Kathleen Vanden Heuvel
2017