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I See You: Judge John T. Noonan Jr. - Writing with Empathy to Prove that the Human Person is Central to the Law

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ARTICLE

I SEE YOU: JUDGE JOHN T. NOONAN JR.—WRITING WITH EMPATHY TO PROVE THAT THE HUMAN PERSON IS CENTRAL TO THE LAW

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Note: This article is based on a presentation I made at the Robbins Collection and Research Center, Berkeley Law symposium entitled "Judge & Scholar: Perspectives on the Intellectual Legacy of John T. Noonan" on September 6–7, 2019. I was one of Judge Noonan's first law clerks; I made the first presentation at the symposium.

I. INTRODUCTION

Long before he became a judge, Judge John T. Noonan Jr. recognized and highlighted "the central place of the human person in any account of the law."[1] One of his intellectual legacies as a federal circuit court judge was recognizing the persons, not masks, who appeared before him. How did he do it? Empathy. Judge Noonan's own words from 2007 capture his judicial philosophy, "From my perspective, it is this conviction at one's inner core, uniting principles and experience and empathy, that counts most in judging."[2]

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1. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS, xv (1975 ed.).

2. John T. Noonan, Jr., *The Religion of the Justice: Does It Affect Constitutional Decision Making?*, 42 TULSA L. REV. 761, 770 (2007). *See also* Charles J. Reid, Jr., *John T. Noonan, Jr.: Catholic Jurist and Judge, in* GREAT CHRISTIAN JURISTS IN AMERICAN HISTORY 208–29 (Daniel L. Dreisbach & Mark David Hall eds., 2019) (focusing on Noonan's concern for persons and the role love plays in legal writing).

Judge Noonan's capacity for empathy as a judge extended beyond his ability to step into the shoes of someone whose life was very different from his own—he was able to write about that person's encounter with the law in a way that makes you, the reader, also relate to the person with empathy.

This article focuses on Judge Noonan's opinions in three areas of law spanning three decades: civil rights, employment, and criminal law. Judge Noonan believed that you cannot love someone you cannot see. I will focus on how the details of his judicial writing—word choice, concision, and narrative techniques—furthered his philosophy of respecting the dignity of every human. He saw them. We do, too.

II. EMPATHY

The subtle difference between sympathy and empathy is often lost in current communication.[3] That is not surprising because the root of both words, the Greek word "pathos," means feelings.[4] We feel for another in sympathy; we feel as another in empathy. Empathy has an "element of personal experience."[5] It is a vicarious experience as we identify with the feelings or thoughts of another.[6]

The title of my article is "I See You," but what I really mean is "I Feel What You Feel" in empathy. It isn't just that Judge Noonan saw and heard the parties, but that he had both the imagination and the humility to feel their experience. And I want to emphasize the importance of those two qualities—imagination and humility.

Not everyone has the capacity to have empathy. Persons suffering from the mental illness of schizophrenia lack empathy.[7] It is a defining feature of their illness—these persons simply cannot put themselves in the

3. "Sympathy" has been an English word since at least the late 16th century. "Empathy" is a much more recent addition to our lexicon, appearing in the early 20th century. The word "empathy" was introduced to English as a translation of German "Einfuhlung" literally meaning "feeling in." The term was used in psychology to mean "the power of projecting one's personality into (and so fully comprehending) the object of contemplation." FOWLER'S DICTIONARY OF MODERN ENGLISH USAGE 257 (Jeremy Butterfield ed., 4th ed. 2015).

4. It is the distinction between the "sun" meaning "with" in sympathy and the "em" meaning "in" in empathy that makes the difference. When we are "with" another in sympathy then we are together, showing compassion for another's hardships. When we are "in" another in empathy then we are using our imagination to actually put ourselves in the other's shoes, seeing the world from the other person's perspective, experiencing the emotions, ideas, or opinions of the other.

5. FOWLER'S DICTIONARY, *supra* note 3, at 257.

6. WEBSTER'S AMERICAN DICTIONARY 261 (College ed. 2000). Empathy can refer to eight different concepts, from imagining another's thoughts and feelings to imagining how one would feel or think in another's place. Susan Lanzoni, *A Short History of Empathy*, THE ATLANTIC (Oct. 15, 2015), https://www.theatlantic.com/health/archive/2015/10/a-short-history-of-empathy/409912 (citing the work of social psychologist C. Daniel Batson).

7. *See* BIRGIT DERNTL, ANDREAS FINKELMEYER, TIMUR K. TOYGAR, ANNA HÜLSMANN, FRANK SCHNEIDER, DANIA I. FALKENBERG & UTE HABEL, *Generalized Deficit in All Core Components of Empathy in Schizophrenia*, 108 SCHIZOPHRENIA RESEARCH 197–206 (2009) (patients with schizophrenia can't process emotion or take the perspective needed for empathy).

shoes of another person. Others might lack the imagination, at least in some circumstances, needed for empathy. This is the point that Judge Noonan made about Judge Cardozo's decision in *Palsgraf v. Long Island Railroad Company*.[8] Judge Noonan said that Cardozo's imposition of "costs in all courts" against Helen Palsgraf was the decision that "seemed least humane."[9] Judge Noonan suggested that Cardozo did not have the imagination to see what a Herculean financial burden he had placed on Helen Palsgraf—she was in debt to her doctor, her lawyer, and now, her adversary.[10] Judge Noonan wrote, "Only a judge who did not see who was before him could have decreed such a result."[11]

Imagination alone, of course, is not enough to give a person the capacity for empathy.[12] Judge Noonan wrote of the destructive use of imagination made by the lawyers who viewed Africans arriving in America as property.[13] What these lawyers lacked was humility and humanity. Judge Noonan noted that the lawyers in the United States "who kept slavery in existence . . . could believe in the natural law of freedom, and champion emancipation, and enforce slavery, so long as the legal universe was a special world with its own rules."[14] George Wythe, the lawyer who taught the others, "had to suppress humanity in himself."[15]

A. Judge Noonan's Insights into Empathy

As early as 1955, Judge Noonan talked about how law teachers must employ empathy when evaluating whether an individual case is "right."[16] He noted that "law is not simply social engineering, if the phrase connotes only the management of social interests for the public good."[17] He said, "What is required here is an empathetic identification with the parties; what is sought is an ascertainment of their reasonable expectations by an imaginative projection into the concrete situation. . . . But what the law teacher

8. NOONAN, PERSONS AND MASKS, *supra* note 1, at 144 (citing Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928)).

9. NOONAN, PERSONS AND MASKS, *supra* note 1, at 144. Costs were discretionary with the court and normally would not be awarded in cases when the legal question raised was "a doubtful one and fairly raised." As Judge Noonan noted, "By a margin of one, [Palsgraf's] case had been pronounced unreasonable." NOONAN, PERSONS AND MASKS, *supra* note 1, at 144.

10. NOONAN, PERSONS AND MASKS, *supra* note 1, at 144.

11. NOONAN, PERSONS AND MASKS, *supra* note 1, at 144.

12. Empathy often requires courage. Monroe H. Freedman, *John T. Noonan, Jr.: Exemplar of Ethical Conduct*, 11 J. OF L. AND RELIGION 229–34 (1995) (Noonan showed courage as a judge in a death penalty case and as a law student defending students associated with Communist groups).

13. NOONAN, PERSONS AND MASKS, *supra* note 1, at 39.

14. NOONAN, PERSONS AND MASKS, *supra* note 1, at 60.

15. NOONAN, PERSONS AND MASKS, *supra* note 1, at 58.

16. John T. Noonan, Jr., *Value References in Negligence*, 8 J. LEG. EDUC. 150, 161 (1955).

17. *Id.* at 160.

must call on here is his own developed sense of fairness, his own educated ability to empathize."[18]

Judge Noonan's premise in the 1975 preface to *Persons and Masks of the Law* is often quoted:

> The central problem, I think, of the legal enterprise is the relation of love to power. We can often apply force to those we do not see, but we cannot, I think, love them. Only in the response of person to person can Augustine's sublime fusion be achieved, in which justice is defined as "love serving only the one loved."[19]

By 2002, with fifteen years on the bench, he used the word "empathy." He said, "Attention to the person in these modest ways are [*sic*] exercises in empathy, the primary way a judge can respond to the persons affected by the judge's decision."[20] He listed concrete ways that a judge could show empathy: stating a criminal sentence in years not months, referring to a defendant with respect by "noting the defendant's first name and referring to him regularly by his last name and not misspelling it."[21] He specified additional situations that call for empathy—in asylum cases "an effort at imaginative identification with the asylum-seeker is necessary for the judge," and when religious freedom is claimed, then "a degree of vicarious identification with the believer is essential for the judge."[22]

The words he used to describe empathy—"imaginative identification" and "vicarious identification"—mesh with how I use the word "empathy" here to mean the capacity to imagine oneself in the position of another and, thus, experience the thoughts, opinions, feelings, and emotions of another even if one does not agree with all those thoughts and opinions.

Judge Noonan gives us guidance on how we can gain the capacity for empathy. When delivering the Constitutional Law Day Lecture at the University of Tulsa College of Law in 1986, his talk was entitled "The Religion of the Justice: Does It Affect Constitutional Decision Making?"[23] Judge Noonan concluded that conscience, that inner guide, "counts most in judging."[24] Of course, a judge's relationships with others, including his parents, his spouse, and his children, will "help mold the mind, the sensibility, the capacity for empathy that affect judgment."[25] Judge Noonan was quick to point out that many experiences, including prior legal experience, educa-

18. *Id.* at 161. Noonan said that education is moral. A law teacher has "several means of determining the correctness of a case, and of course, they complement—not exclude—each other." *Id.*

19. NOONAN, PERSONS AND MASKS, *supra* note 1, at xx.

20. NOONAN, PERSONS AND MASKS, *supra* note 1, at xi.

21. NOONAN, PERSONS AND MASKS, *supra* note 1, at xi.

22. NOONAN, PERSONS AND MASKS, *supra* note 1, at xii-xiii.

23. Noonan, *The Religion of the Justice*, *supra* note 2, at 769.

24. Noonan, *The Religion of the Justice*, *supra* note 2, at 770.

25. Noonan, *The Religion of the Justice*, *supra* note 2, at 769.

tion, and "the small segment of experience constituted by religious belief[,] must mesh with the rest of the myriad."[26]

But Judge Noonan recognized that personal experience was not necessary. He noted that Cardozo never married and never had any children.[27] Thus, "[h]e lacked the experience"[28] of being a spouse or father. Noonan said that was not a disqualification from deciding issues on marriage or parenthood.[29] He wrote, "Personal experience is scarcely necessary to judge the quality of an act or relationship."[30] In what I believe is the shortest sentence in *Persons and Masks of the Law* he then concluded, "Empathy suffices."[31]

B. Three Noonan Cases

I chose three cases to support my point that it was Judge Noonan's empathy in judging and then the empathy he showed in his writing that put his tenet—the human person is central to the law—into practice.

A valid question is why I chose these three particular cases.

First, they spanned Judge Noonan's three-decade career. One was decided in 1988, one in 1998, and one in 2015.

Second, they are short opinions. One takes up just over two pages in the *Federal Reporter*; the other two are a slight page and a half each.[32] Judge Noonan knew the power of brevity; he wrote, "Holmes's succinct prose is deliberately compressed to make an impact."[33] The same can be said of these three opinions.

Third, I picked cases where the facts and law of the case do not scream "empathy." For it is in these subtle, some may even call them mundane, cases where Judge Noonan shows that empathy is just as essential as in a case where even the hard-hearted would be empathetic.

Finally, I chose cases addressing legal subject areas that others might overlook. That is not intended to diminish Judge Noonan's incredible work

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26. Noonan, *The Religion of the Justice*, *supra* note 2, at 769.

27. NOONAN, Persons and Masks of the Law, *supra* note 1, at 143.

28. NOONAN, Persons and Masks of the Law, *supra* note 1, at 143.

29. NOONAN, Persons and Masks of the Law, *supra* note 1, at 143. Yet Noonan recognized that Cardozo's status as a single, childless man meant he would "have an approach to a chain of calamities like *Palsgraf* different in outlook and emotional context from that of the reflective spouse and parent." NOONAN, Persons and Masks of the Law, *supra* note 1, at 143.

30. NOONAN, Persons and Masks of the Law, *supra* note 1, at 143.

31. NOONAN, Persons and Masks of the Law, *supra* note 1, at 143.

32. In my book about our most eloquent American Presidents, I use Abraham Lincoln as an example of a writer who knew the persuasive quality of brevity. JULIE A. OSEID, COMMUNICATORS-IN-CHIEF: LESSONS IN PERSUASION FROM FIVE ELOQUENT AMERICAN PRESIDENTS 85–109 (2017). I didn't think Judge Noonan would mind if I made a writing comparison between his work and Lincoln's.

33. John T. Noonan, Jr., *The John Dewey Memorial Lecture: Education, Intelligence, and Character in Judges*, 71 MINN. L. REV. 1119, 1124 (1987). Noonan "disagreed with much of what Holmes said." NOONAN, Persons and Masks of the Law, *supra* note 1, at xx.

as a judge in immigration, death penalty, religious liberty, and assisted suicide cases.[34] It is instead a way for me to demonstrate his consistent approach, no matter who appeared before him and no matter what the underlying legal issue was.

I review Judge Noonan's opinions in three areas of law spanning three decades: civil rights, employment, and criminal law. I start by suggesting the way Judge Noonan found empathy in each case, then review the respective facts, and finally analyze his legal analysis and writing techniques.

1. Johnston v. Koppes, 850 F.2d 594 (9th Cir. 1988)

Empathy Technique: Understanding the feelings or opinions of another even if you disagree with those opinions.

In this opinion, Judge Noonan told the story of how a government lawyer "favorable to the right to abortion and public funding for abortion" attended a hearing of the California legislature without her supervisor's permission; he then held that she had a colorable 42 U.S.C. Section 1983 claim based on her First Amendment assembly rights.[35] Judge Noonan was pro-life,[36] so he would not support legislation favorable to abortion. But Judge Noonan had a capacity for empathy in this case that is beyond most of our abilities: he connected to someone who held ideas and opinions that he disagreed with. I suspect that he connected to Johnston's underlying emotion, which likely combined disappointment, anger, and frustration at being punished by her employer for exercising her First Amendment freedom of assembly rights.

a. Facts

Joyce Johnston was an attorney working for the Department of Health Services as a lead attorney for the Preventive Health Section.[37] She asked for two hours of vacation time to attend a California Legislature committee hearing on "the use of state funds for abortion."[38] Her request was turned down by two supervisors, but she "nonetheless attended the hearing."[39] She did not speak at the hearing, "nor communicate her views in any manner."[40] One of her supervisors was "angry that she had come to the hearing" because he knew that staff members might be called on to testify and John-

34. *See* Kathryn A. Lee, *The Religious Imagination, Empathy, and Hearing the "Other": Judge John T. Noonan, Jr. and Immigration*, 83 U. DET. MERCY L. REV. 923 (2006).

35. Johnston v. Koppes, 850 F.2d 594, 595 (9th Cir. 1988).

36. Judge Noonan was pro-life. *See* John T. Noonan, Jr., *An Almost Absolute Value in History*, *in* THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 1 (John T. Noonan, Jr., ed., Harv. Univ. Press 1970).

37. *Johnston*, 850 F.2d at 595.

38. *Id.*

39. *Id.*

40. *Id.*

ston, a supporter of using public funds for abortion, did not agree with the policies of the office.[41]

The day after the hearing, Johnston lost her status as "lead attorney" and was transferred. Johnston filed a grievance for denial of her vacation request, and her supervisor ultimately changed her absence from "absence without leave" to "vacation."[42] Johnston filed a 42 U.S.C. Section 1983 complaint, claiming retaliation.[43] She said she had been punished for exercising her freedom of speech, freedom of assembly, and right to petition the government for redress of grievances.[44]

b. Judge Noonan's Legal Analysis and Writing

The defendants claimed qualified immunity because they did not violate "any clearly established constitutional norm."[45] Not so, said Judge Noonan, writing for the panel, which also included Judge Oliver Koelsch and Judge Diarmuid O'Scannlain.[46]

Johnston's freedom of speech claim was "brought into some question by her statement that she went to the [public] hearing as a spectator and in fact did not communicate her views 'in any manner.'"[47] But the panel did not need to decide whether her speech was protected because she also had the right "peacefully to assemble, and to petition the Government for a redress of grievances."[48]

Judge Noonan used several writing techniques to show his empathy toward Johnston and make us also feel that empathy.[49]

1. He acknowledged the gravity of the underlying issue. He wrote, "Abortion and abortion rights are matters of great public concern. The consciences of citizens are divided on them."[50] Because the issue is one of such "great public concern," then any reader, no matter the reader's position on the issue, can relate to Johnston's conviction and all the emotions that accompany such a conviction.

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41. *Id.*

42. *Id.*

43. *Johnston*, 850 F.2d at 595.

44. *Johnston*, 850 F.2d at 595. She also alleged religious discrimination. *Id.* at 596.

45. *Id.* at 596.

46. Judge O'Scannlain gave one of the eulogies at Judge Noonan's funeral Mass.

47. *Johnston*, 850 F.2d at 596.

48. *Id.* (quoting Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 465 (1979)).

49. Noonan was a gifted writer. *See* Joseph Vining, *Reading John Noonan*, 59 VILL. L. REV. 715, 718 (2014) ("The book [A CHURCH THAT CAN AND CANNOT CHANGE] is beautiful in its form and in its sentences despite its chilling substance [what slavery really meant], as if Noonan were continually reminding the reader how human life can be lived. Its chapters and sections are like verses.").

50. *Johnston*, 850 F.2d at 596.

2. He stated a well-accepted universal right. Just like any citizen, Johnston as a public employee had a right to "let the legislature know of her conscientious concern."[51] We can relate to Johnston's plight because we too want to know that our right to talk to our legislators is always preserved.

3. He relied on the controlling legal rule. He noted that Johnston did not attend the meeting "during working hours" because she was retroactively granted vacation time.[52] Johnston did not breach any professional duty to her client, the Department of Health Services, because "she was not acting against the Department in any professional capacity."[53] Instead, "on her own time, as a free citizen, Joyce Johnston freely exercised her right to be present at a hearing on a question that touched her conscience."[54]

4. He faced, head on, the defendant's counterarguments. One supervisor raised the affirmative defense that he acted in good faith because he relied on the advice of a lawyer.[55] But Judge Noonan pithily wrote, "Four difficulties attend his argument." Judge Noonan devoted one sentence to each difficulty; he then concluded that he could not find good faith when the advice was "from a subordinate, based on incorrect facts, sought in part after the action and not addressed to constitutional rights at all."[56] He also dismissed any claim that Johnston violated a professional norm "by putting her in conflict with the interests of her 'client.'"[57] Judge Noonan was an expert in professionalism issues. He agreed that when an employee is acting in a professional capacity, then loyalty to a client requires "subordination of a lawyer's personal interests."[58] But here Johnston was acting "on her own time."[59]

5. He used vivid language. He emphasized that loyalty to a client does not require "extinguishment of a lawyer's deepest convictions."[60] The word "extinguishment" helps the reader visualize and feel the fire in Johnston to support her "deep" conviction. He said Johnston was sharing her views "on her own time," thus appealing to our own understanding of what our freedoms are when we are not working.

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51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 596–97.
55. *Johnston*, 850 F.2d at 596.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

6. He repeated the word—"conscience"— that was the crux of the case. The word is used twice in the opinion: "consciences of citizens"[61] and "touched her conscience."[62] Using the same root word, Judge Noonan said that Johnston wanted to let the legislature know of her "conscientious concern."[63]

2. *DiIenno v. Goodwill Indus. of Mid-Eastern Pennsylvania*, 162 F.3d 235 (3d Cir. 1998)

Empathy Technique: Finding empathy by connecting to your own experience.

In this opinion, Judge Noonan vividly described how a Goodwill employee had previously been able to start work early, "a privilege she relished"; he then held that a reasonable jury could find her removal from the position that allowed her to start early was an adverse employment action.

It was the word "relished" that struck me. Most lawyers would say that she "appreciated" or "liked" having keys so that she could get to work early. Not Judge Noonan. He chose the word "relish," which conjures a positive, sensory experience. And he connects that word "relish" to a daily experience. Can't we all easily imagine something we relish in our daily routine?

What did Judge Noonan relish in his daily routine? He told me that when he was a professor at Berkeley, he walked each day from his home in the Berkeley hills to campus and then walked back up the hill to go home. When I moved to California, Judge Noonan's three children were all between fourteen and seventeen years old. They were then and still are delightful people. But a house full of children cuts into your reflection time, so I suspect that Judge Noonan's daily routine of walking to and from work gave him empathy for everyone else who found a tiny quiet space in the day. This was the daily routine he relished; he was able to connect to his own experience to have empathy for Christine DiIenno's plight when her employer took that sensory, daily experience away from her.

a. Facts

Christine DiIenno was hired by Goodwill in 1992 to work in the Trexlertown store.[64] "The formal job description was tagger-processor but in the Trexlertown store the processor sorted out the bags in which the donated clothes were dumped; taggers identified the brands and priced the

61. *Johnston*, 850 F.2d at 596.
62. *Id.* at 597.
63. *Id.* at 596.
64. DiIenno v. Goodwill Indus. of Mid-Eastern Pennsylvania, 162 F.3d 235 (3d Cir. 1998).

clothes."[65] Two years after she started working, DiIenno was promoted to acting shift supervisor: "[O]ne perk of the job was possession of the keys to the store, enabling her to start her work early, a privilege she relished."[66]

The store manager then began asking her personal questions and, while they were both in the store office, "declared his love for her."[67] When DiIenno asked him to leave, he told her that she "would be demoted to doing processing."[68] She reported the incident to several people, including a female sales manager, who said DiIenno was not supporting management and would have to process clothing.

DiIenno told the manager that she was "phobic of critters—dead or alive that we found in donation bags—mice, insects, bugs."[69] She provided a letter from her physician confirming her phobia. But she was ordered to go through the bags. She "attempted to comply, broke down, trembling and crying, and left."[70]

b. Noonan's Legal Analysis and Writing

Judge Noonan, Chief Judge Edward Roy Becker, and Judge Richard Lowell Nygaard[71] held that "a transfer to a job that an employer knows an employee cannot do may constitute adverse employment action."[72] Judge Noonan wrote to help us feel empathy for DiIenno.

1. He used a legal analysis focused on the person. He noted that the law required judges to determine what constitutes "retaliation" by looking at "what a person in the plaintiff's position would reasonably understand."[73] True, the "reasonably understand" test is actually a broad standard, but it requires the empathy of putting oneself "in the plaintiff's position." And Judge Noonan followed that rule with a directive to consider the individual standing before the court: A person's "job-related attributes" are "important" in deciding whether a lateral transfer was an adverse employment action.[74]

2. He used vivid language. I have already made much of his choice to use the word "relish." But he used several other evocative words as well. To emphasize the distinction between the work of a processor and the work of a tagger, he wrote that processors "sorted out the bags in which

65. *Id.* at 235.
66. *Id.*
67. *Id.* at 236.
68. *Id.*
69. *Id.*
70. *DiIenno*, 162 F.3d at 235.
71. Judge Noonan was sitting by designation in the Third Circuit. *Id.* at 235.
72. *Id.* at 236.
73. *Id.*
74. *Id.*

the donated clothes were *dumped*."[75] The word "dumped" surely was not chosen at random—instead it helps Judge Noonan add heft to his point that DiIenno's fear of "critters" made her unable to process the dumped clothes. In holding that these facts might amount to an adverse employment action, he said, "A reasonable jury could find that Christine DiIenno's employment was *substantially* worsened."[76]

3. He used detail to paint a picture. Judge Noonan quoted DiIenno's explanation of her fear of "critters—dead or alive." Instead of saying that DiIenno tried to comply but couldn't, he gives the detail that she "attempted to comply, broke down, trembling and crying, and left."[77]

4. He stated the rule and then contrasted it with other situations that were not job-related. He explicitly said, "An inability to do a particular job is job-related, unlike a desire to live in a certain city."[78]

5. He backed his stated rule up with citations and an effective use of parentheticals. He cited a First Circuit case holding that setting an employee up to fail can be an adverse action; a Second Circuit case holding that reassignment to a job requiring a five-story climb could be retaliatory if the employer knew of the employee's difficulty climbing stairs; and a Third Circuit case holding that "when the school board knew that the plaintiff would quit if denied paternity leave, the denial constituted a constructive discharge."[79]

3. United States v. Pedrin, 806 F.3d 1009 (9th Cir. 2015)

Empathy Technique: Finding empathy by asking the nonexpert.

Judge Noonan used another form of empathy in *United States v. Pedrin*. He explained how the government enticed the defendant with "psychological tricks" to participate in a crime, then unsuccessfully urged his fellow Ninth Circuit judges to grant a rehearing en banc to reconsider whether the defendant had been entrapped.

I call this empathy technique the "run it by the nonexpert" technique. Judge Noonan wanted to know how a nonlawyer would react to the government's actions.

Let me give just two examples of how this worked.

First, at least while I was clerking for him in 1986, Judge Noonan spent a significant amount of time every day with nonlawyers. The car com-

75. *Id.* at 235 (emphasis added).
76. *DiIenno*, 162 F.3d at 236 (emphasis added).
77. *Id.*
78. *Id.*
79. *Id.* (citing Schafer v. Bd. of Pub. Educ., 903 F.2d 243 (3d Cir. 1990)).

mute from the East Bay area, where the Noonans lived, into San Francisco required travel on the busy Bay Bridge. Judge Noonan waited on the east side of the bridge to be picked up by someone driving west.[80] This "casual carpooling" allowed cars with three passengers to shave up to twenty minutes off their commuting time and avoid the one-dollar toll. I recall that this was the way Judge Noonan got to work almost every day in 1986.[81]

I do not suggest that Judge Noonan ever discussed any confidential information with any of his fellow carpoolers or drivers—obviously he never did that. But I do suggest that this was an ingenious way Judge Noonan discovered to not only save commuting time but also keep up with the pulse of what nonlawyers thought. When evaluating the question "What makes a judge great?," Judge Noonan looked at empirical data, including the education of seven judges who arguably could qualify as great judges.[82] Judge Noonan noted that all seven judges "were soaked in the social consciousness of their periods."[83] The daily commute gave Judge Noonan a way to soak himself in the social consciousness of his day.

I saw this practice even more starkly in a second circumstance way. During the last five years of Judge Noonan's life, my husband, Jeff, and I were in the Bay Area in December each year. We often visited Judge and Mrs. Noonan at their breathtakingly lovely home in Berkeley. We enjoyed reminiscing about the old days and talking about current events. One visit stands out. Judge Noonan shared the *Pedrin* facts and explained that he was urging the Ninth Circuit to rehear the case en banc. But here is the memorable thing: He was not interested in what I thought about the government's actions. Instead, he peered intently into Jeff's eyes as he described the facts and then asked whether that seemed like a thing the government should do.

In the *Pedrin* case, Judge Noonan was on his own.[84] Judges William A. Fletcher and Morgan Christen were on the original panel with Judge

80. Nat'l Acad. of Sci., Eng'g, and Med., *Chapter 2 – HOV Facilities: Traveler Response to Transportation System Changes*, *in* TRANSIT COOPERATIVE RESEARCH PROGRAM (TCRP) REPORT 95: TRAVELER RESPONSE TO TRANSPORTATION SYSTEM CHANGES, 2–70 (2006).

81. Apparently, 8,000 other people were also carpooling this way in the 1980s. *Id.* The practice was interrupted for a time by an earthquake, but by 1998 the estimate was again that 8,000 people were casual carpoolers on the Bay Bridge. *Id.*

82. Noonan, *The John Dewey Memorial Lecture*, *supra* note 34, at 1122–24.

83. Noonan, *The John Dewey Memorial Lecture*, *supra* note 34, at 1124. Noonan also pointed out that the judges were also soaked in "the legal profession of their day." He concluded, "[t]heir education was achieved by their intelligent participation in this consciousness." Noonan, *The John Dewey Memorial Lecture*, *supra* note 34, at 1124.

84. Perhaps Judge Noonan did not like anything remotely related to entrapment. He used an entrapment case as an example of Brandeis's fortitude, pointing out that Brandeis dissented from the Holmes majority and wrote "that 'to protect the Government' a court should not accept evidence obtained by entrapment." Noonan, *The John Dewey Memorial Lecture*, *supra* note 34, at 1131 (citing Casey v. United States, 276 U.S. 413, 425 (Brandeis, J., dissenting)).

Noonan; Judge Noonan dissented.[85] The panel voted to deny the petition for rehearing en banc.[86]

a. Facts

Judge Noonan considered two separate legal issues: whether the government relied on "psychological tricks to persuade Pedrin to participate in the crime" and whether Pedrin was predisposed to participate in the crime.[87]

Judge Noonan emphasized four facts in showing that the government used "psychological tricks":

1. "First, the confidential informant was co-defendant Omar Perez's uncle, and therefore someone to whom Perez and Pedrin, a close friend of Perez's, were more likely to succumb than they otherwise might."[88]

2. Second, this uncle "peer-pressured" Perez and Pedrin by saying the government agent was "very cool people," admitted that he wanted to do the job, and suggested that he would find others to do the job if they wouldn't.[89]

3. Third, the government put "time pressure" on the defendants by saying "the opportunity was only available to them for a limited period."[90]

4. The government agent removed "some of the moral qualms" by saying that he had "no love" for the drug dealers they would rob and that the drug dealers were cheating him out of his fair share of the profits.[91]

For the second legal issue—Pedrin's predisposition—Judge Noonan noted that the government knew nothing about Pedrin and nothing in his record suggested he would commit this type of crime.[92] Judge Noonan reviewed the details of Pedrin's prior record and said it contained "no crimes related to dealing cocaine, robberies, or home invasions."[93] Also, only an unreliable narrator who had much to gain and who was ten years older than Pedrin said that Pedrin previously committed a stash house robbery.[94] The

85. United States v. Pedrin, 797 F.3d 792 (9th Cir. 2015).

86. United States v. Pedrin, 806 F.3d 1009 (9th Cir. 2015) (no judge of the court requested a vote on whether to rehear the case en banc).

87. *Id.* at 1010.

88. *Id.*

89. *Id.* Noonan also referenced his dissent in United States v. Pedrin, 797 F.3d 792 (9th Cir. 2015), but that dissent primarily addressed whether the court could decide if Pedrin was entrapped even though Pedrin did not raise that defense.

90. *Id.*

91. *Id.*

92. *Pedrin*, 806 F.3d at 1010.

93. *Id.*

94. *Id.*

government had no independent evidence to corroborate this unreliable narrator's account.[95]

b. Judge Noonan's Legal Analysis and Writing

Here is how Judge Noonan created empathy for Pedrin.

1. Once again, he used vivid language. The United States Supreme Court, when recognizing the entrapment defense in 1932,[96] used the word "lure" one time.[97] Judge Noonan used the word three times: first to state the rule, "The government is guilty of entrapment when it lures a person into committing a crime that he was not predisposed to commit";[98] second, to point out that Pedrin claimed the government lured him;[99] and third, to conclude that the government had "employed psychological pressure" in "luring" Pedrin.[100] He also used other vivid words: describing the government's behavior in "dangling before [Pedrin] a scheme that was 'rich in pay off,' and involved little work or risk."[101] The word "dangling" perfectly makes his point. He also used the word "tricks" to vividly describe how the government "relied on psychological tricks to persuade Pedrin to participate in the crime."[102]

2. Judge Noonan wove the facts with the legal standards to create a seamless story about how the government used psychological pressure to entice Pedrin to commit the stash house burglary. I listed the facts above, but those facts came after Judge Noonan explained the legal standards. He did not separate the facts from the law.

3. Judge Noonan incorporated mini-stories into the opinion. He gave three examples from precedent cases to show that the government, as in the precedent cases, had used "psychological tricks to persuade Pedrin to

95. *Id.* at 1011.

96. *Pedrin*, 797 F.3d at 798 (Noonan, J., dissenting) (citing Sorrells v. United States, 287 U.S. 435 (1932)).

97. "We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Sorrells*, 287 U.S. at 448.

98. *Pedrin*, 806 F.3d at 1009.

99. "Pedrin asserts that the government lured him into a plan to rob a fictitious stash house by dangling before him a scheme that was 'rich in pay off,' and involved little work or risk." *Id.* at 1010.

100. "Because the government employed psychological pressure in luring Pedrin into planning to commit the crime, and because the government could not prove his disposition to commit such a crime beyond a reasonable doubt, I recommend granting the petition for rehearing en banc . . . ." *Id.* at 1011.

101. *Id.* at 1010.

102. *Id.*

participate in the crime."[103] In *Sorrells*, "the government agent was, like Sorrells, a war veteran who relied on this status in order to pressure Sorrells into getting him liquor."[104] In *Sherman*, the government relied on "an informant who was, like Sherman, a recovering drug addict and who 'resort[ed] to sympathy' to persuade Sherman to buy drugs."[105] In *Jacobson*, the government put pressure on Jacobson by "repeatedly sending him mailings tempting him to purchase the illegal materials."[106]

4. He makes a subtle reference to a device from fiction—the unreliable narrator. He relies on the legal standard that requires the government to prove predisposition beyond a reasonable doubt.[107] He suggests that co-defendant Terry Bombard's testimony that Pedrin had previously committed a stash house robbery was tainted because Bombard was "more than ten years older than twenty-four-year-old Pedrin" and testified against Pedrin "in exchange for a deal of ten years instead of a life sentence."[108]

III. Conclusion

I end with the bookend stories of how I met and ultimately said goodbye to Judge Noonan.

In the fall of 1985, I grabbed the November 4, 1985, *Time* magazine off the coffee table when visiting a friend's family in Milwaukee. Inside was a story that would change my life. Here is the line I remember:

> One result [of an intense review process to examine candidates] is an impressive level of competence. . . . At the appellate level [President Reagan] has chosen a number of stars. "John Noonan is one of the five smartest guys in the world," says one Justice official proudly.[109]

Once I learned that the Senate confirmed Judge Noonan, I called him. Out of the blue. This was not something I normally did, but such was my fervor in hoping to secure a clerkship with him.

I used the phone in the *Minnesota Law Review* office and dialed Judge Noonan's phone number at Berkeley Law School. He answered. I explained that I had recently lost a clerkship when an appellate judge I planned to

103. *Id.*
104. *Pedrin*, 806 F.3d at 1010 (citing *Sorrells*, 287 U.S. at 440–41 (1932)).
105. *Id.* (citing Sherman v. United States, 356 U.S. 369, 373 (1958)).
106. *Id.* (citing Jacobson v. United States, 503 U.S. 540, 550 (1992)).
107. *Id.* at 1010, 1011.
108. *Id.* at 1010–11.
109. Ezra Bowen & Anne Constable, *Judges with Their Minds Right*, TIME Magazine, Nov. 4, 1985, at 77. "He is also the author of scholarly books on the history of bribery and the Catholic Church's teaching on contraception, though this clearly counts less than the fact that he is an articulate critic of abortion." *Id.*

clerk for retired and then I asked if he needed a clerk for the fall of 1986. He replied that those spots would be filled with recent Berkeley Law graduates. Then he paused for a moment and said, "But I need a clerk now. What are you doing now?" Without hesitation I said, "I'm moving to San Francisco as soon as I can, so that I can clerk for you."

Thirty-one years after I first heard his voice, I sat at Judge Noonan's funeral at St. Albert's Priory. My daughter Olivia and I arrived early and sat in the second set of stallums.[110] I was seated directly next to a small aisle separating this second set of stallums from the first.

The first set of stallums had been reserved for the eulogists, judges, and professors attending the funeral, but immediately before the service began people filled the few empty seats left open in that first section. The man who sat in the small aisle next to me was a bit disheveled and confused, but he responded throughout the service by lightly laughing when a eulogist made a wry remark and remaining somber during the Mass.

There is a point in the Catholic Mass called the Sign of Peace, an opportunity for the congregation to turn to those seated nearby and say, "Peace be with you." During this Sign of Peace, the man next to me turned, broke into a huge grin, and enthusiastically shook my hand. I've been a Catholic my whole life, and the Sign of Peace has been part of the Catholic Mass since I was a child, so I don't know how many Signs of Peace I have experienced. But none was as warm as this one. I wondered if he came to the funeral for this very moment—this chance to touch and interact with another person.

Then it was my turn to smile. I thought, "This is perfect. Just so perfect." Directly next to this man, on the outside of his stallum, was a sign reading "Dignitaries." What better reminder could we have of the true dignitaries in our midst?

Judge Noonan recognized those dignitaries during his judicial career. He had an incredible ability to step into the shoes of the forgotten, the downtrodden, the neglected, and the powerless. He saw, heard, and felt what it was like to be the accused criminal defendant entrapped by the government, the death-row inmate, the illegally deported immigrant, the person who wanted to share her views on public funding for abortion, and the employee clinging to a tiny bit of scheduling freedom.

He used his gift of empathy, his razor-sharp understanding of the law, and his stellar writing style to help us also see and feel what it is like to be the persons who are "inextricably part of the [law's] application."[111]

110. Stallums are carved wooden seats facing another set of wooden seats across a large center aisle.

111. NOONAN, Persons and Masks of the Law, *supra* note 1, at xiv.