

# University of St. Thomas Law Journal

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Manuscript 1522

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## ARTICLE

# JUDGE JOHN T. NOONAN, JR. v. JOE ARPAIO

DR. CHARLES J. REID, JR.\*

John Noonan's jurisprudence, it has been written, depends upon the formation of an "empathic bond between judge and litigant."<sup>1</sup> This paper is intended as an exploration of how Noonan's jurisprudence functions in practice. Over the course of three decades on the Ninth Circuit Court of Appeals, Judge Noonan established himself as one of America's most original, insightful, and genuinely empathetic judges.<sup>2</sup> While hundreds of his judicial opinions might have been chosen for this investigation, I have selected only a single one. The case to be examined is *Wagner v. County of Maricopa*, involving a wrongful death action and civil rights claims brought against the county and its sheriff, Joe Arpaio.<sup>3</sup>

### I. THE VIGILANTE SHERIFF

Joe Arpaio, the former sheriff of Maricopa County, rose to power in 1992. He was born in New England in 1932, to Italian immigrant parents, and was raised by his father after his mother's death at the time of his

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1. Robin West, *The Anti-Empathetic Turn*, in *PASSIONS AND EMOTIONS: NOMOS LIII* 243, 243 (James E. Fleming ed., N.Y. Univ. Press, 2012).

2. For a sampling of scholarship on Noonan see generally M. Cathleen Kaveney, *Listening For the Future in the Voices of the Past: John T. Noonan Jr. on Love and Power in Human History*, 11 *J.L. & RELIGION* 203, 203–27 (1994); Sophie H. Pirie, *John T. Noonan as Judge: What Empathetic Judging Means for Women*, 12 *J.L. & RELIGION* 541, 541–52 (1995); 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, 923–46 (2006); Charles J. Reid, Jr., *John T. Noonan, Jr.: Catholic Jurist and Judge*, in *GREAT CHRISTIAN JURISTS IN AMERICAN HISTORY* 208, 208–29 (Daniel Dreisbach & Mark David Hall, eds., Cambridge University Press, 2019).

3. *Wagner v. Cnty. of Maricopa*, 673 F.3d 977 (9th Cir. 2012), *amended by* 747 F.3d 1048 (9th Cir. 2013).

delivery.<sup>4</sup> He moved to the western United States in his twenties, worked for federal law enforcement for a period of years,<sup>5</sup> and first won election as Maricopa County sheriff in 1992, at the age of sixty.<sup>6</sup> He was endorsed at the time by the *Arizona Republic*, which praised his seeming competence and recommended him as the best choice to reform “our clownish sheriff’s department.”<sup>7</sup>

And so commenced a near-quarter century of controversy and misrule. In the latter stages of his career, Arpaio became notorious for his grandstanding against undocumented immigrants<sup>8</sup> and for his bizarre and false allegations that President Barack Obama was not born in the United States (he was a leader of the so-called Birther Movement).<sup>9</sup> In July 2017, Arpaio was found guilty of criminal contempt of court “for defying a judge’s . . . order to refrain from racially profiling Latinos during patrols.”<sup>10</sup> One month later, however, he was pardoned by Donald Trump<sup>11</sup> in an action condemned by many as an abuse of executive authority.<sup>12</sup>

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4. RICHARD K. GHERE, RHETORIC IN HUMAN RIGHTS ADVOCACY: A STUDY OF EXEMPLARS 193 (2015); Politico Staff, *Full Transcript: Politico’s Glenn Thrush Interviews Sheriff Joe Arpaio*, POLITICO (June 20, 2016), <https://www.politico.com/story/2016/06/off-message-transcript-joe-arpaio-224519>.

5. Gennifer Furst, *Arpaio, Joseph M.*, in THE SOCIAL HISTORY OF CRIME IN AMERICA: AN ENCYCLOPEDIA 65, 66 (Wilbur R. Miller, ed., 2012).

6. See William Finnegan, *Sheriff Joe*, THE NEW YORKER, July 20, 2009, at 42.

7. Editorial, *Our Choices: Arpaio For Sheriff*, ARIZ. REPUBLIC, Nov. 1, 1992, at C4.

8. Ordered by a federal court to halt his vigilante-style enforcement of immigration laws, he was charged with criminal contempt of court in October 2016. See, e.g., A.J. Vicens, *Sheriff Joe Arpaio Will Be Charged with Contempt of Court*, MOTHER JONES (Oct. 11, 2016), <https://www.motherjones.com/politics/2016/10/ap-sheriff-joe-arpaio-be-charged-criminal-contempt-court-over-immigration-patrols>; Megan Cassidy, *Maricopa County Sheriff Officially Charged With Criminal Contempt*, THE REPUBLIC | AZCENTRAL.COM (Oct. 25, 2016), <https://www.azcentral.com/story/news/local/phoenix/2016/10/25/maricopa-county-sheriff-joe-arpaio-officially-charged-criminal-contempt/92472998/>.

9. E.g., J. Weston Phippen, *The Last of the Birthers*, THE ATLANTIC (Dec. 15, 2016), <https://www.theatlantic.com/news/archive/2016/12/sheriff-joe-arpaio-the-birther/510857/>; Joe Hagan, *The Long, Lawless Ride of Sheriff Joe Arpaio*, ROLLING STONE (Aug. 2, 2012), <https://www.rollingstone.com/culture/culture-news/the-long-lawless-ride-of-sheriff-joe-arpaio-231455/>.

10. Melissa Etehad, *Joe Arpaio, Former Sheriff in Arizona, Is Found Guilty of Criminal Contempt*, L.A. TIMES (July 31, 2017), <https://www.latimes.com/nation/la-na-joe-arpaio-verdict-20170706-story.html>; see also United States v. Arpaio, 906 F.3d 800 (9th Cir. 2018) (reviewing the main issues).

11. See Devin Barret & Abby Phillip, *Trump Pardons Former Arizona Sheriff Joe Arpaio*, THE WASHINGTON POST (Aug. 25, 2017), [https://www.washingtonpost.com/world/national-security/trump-pardons-former-arizona-sheriff-joe-arpaio/2017/08/25/afbff4b6-86b1-11e7-961d-2f373b3977ee\\_story.html](https://www.washingtonpost.com/world/national-security/trump-pardons-former-arizona-sheriff-joe-arpaio/2017/08/25/afbff4b6-86b1-11e7-961d-2f373b3977ee_story.html).

12. See, e.g., Bernadette Meyler, *Trump’s Theater of Pardoning*, 72 STAN. L. REV. ONLINE 92, 92–102 (2020); Scott P. Johnson, *President Donald J. Trump and the Potential Abuse of the Pardoning Power*, 9 FAULKNER L. REV. 289, 301–02 (2018); Editorial Board, *Opinion, The Arpaio Pardon Displays Trump’s Disdain For the Rule of Law*, THE WASHINGTON POST (Aug. 28, 2017), [https://www.washingtonpost.com/opinions/the-arpaio-pardon-displays-trumps-disdain-for-the-rule-of-law/2017/08/28/062b0334-8c2c-11e7-8df5-c2e5cf46c1e2\\_story.html](https://www.washingtonpost.com/opinions/the-arpaio-pardon-displays-trumps-disdain-for-the-rule-of-law/2017/08/28/062b0334-8c2c-11e7-8df5-c2e5cf46c1e2_story.html); Ishaan Tharoor, *Trump Takes Another Authoritarian Turn With Arpaio Pardon*, THE WASHINGTON POST (Aug. 28, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/08/28/trump-takes-another->

What is of particular interest, however, is Arpaio's management of the Maricopa County jails. Laconically drafted Arizona statute law empowered local sheriffs to "[a]rrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense"<sup>13</sup> and to "[t]ake charge of and keep the county jail . . . and the prisoners in the jail."<sup>14</sup> While the statute provided further instructions on the maintenance of inmates convicted of a crime, it was silent on the question of the proper handling of newly arrested prisoners detained merely because of a suspicion of causing a disturbance.

Arpaio approached the responsibilities of law enforcement with a Manichaeian worldview. "The reality is stark," he once wrote: "Either the good guys will prevail and restore some sense of decency and honor and respect to our society, or the bad guys will come out on top and destroy everything we hold dear."<sup>15</sup> No surprise, therefore, that Arpaio established an atrocious and bloody record in the detention of such persons. In March 1996, Jose Rodriguez was allowed to choke to death on his own vomit even as other inmates tried unsuccessfully to call his plight to the attention of the jailers.<sup>16</sup>

In June 1996, former Brigham Young University football player Scott Norberg was arrested, placed in a "restraint chair," and repeatedly taunted and tasered, and he subsequently died.<sup>17</sup> Maricopa County was forced to pay an eight million dollar settlement to Norberg's family.<sup>18</sup> By this time, even the *Arizona Republic*, famous for its conservative editorial positions,<sup>19</sup> had turned against Arpaio.<sup>20</sup>

Still, the atrocities continued. In August 2001, Charles Agster was killed while in the custody of the Maricopa County jails. A slightly built man with "the mental capacity of a twelve-year old," he was repeatedly

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authoritarian-turn-with-arpaio-pardon; Kevin R. Johnson, *The Pardon of Sheriff Joe Arpaio and the Rule of Law*, *LATINX TALK* (Sept. 19, 2017), <https://latinxtalk.org/2017/09/19/the-pardon-of-sheriff-joe-arpaio-and-the-rule-of-law-2>.

13. ARIZ. REV. STAT. § 11-441(A)(2) (2009).

14. *Id.* § 11-441(A)(5).

15. JOE ARPAIO & LEN SHERMAN, *AMERICA'S TOUGHEST SHERIFF: HOW TO WIN THE WAR ON CRIME* XXI (1996).

16. John Dickerson, *Dead End*, *PHOENIX NEW TIMES* (Dec. 20, 2007), <https://www.phoenixnewtimes.com/news/dead-end-6438519>.

17. David Holthouse, *Murder on Madison: The Norberg Remix*, *PHOENIX NEW TIMES* (Apr. 15, 1999), <https://www.phoenixnewtimes.com/news/murder-on-madison-the-norberg-remix-6445595>.

18. Tony Ortega, *The \$8 Million Dollar Victim*, *PHOENIX NEW TIMES* (Jan. 14, 1999), <https://www.phoenixnewtimes.com/news/the-8-million-victim-6421396>; Associated Press, *Family of Ex-Y Football Player to Get \$8.25 Million*, *DESERET NEWS* (Jan. 12, 1999), <https://www.deseret.com/1999/1/12/19422946/family-of-ex-y-football-player-to-get-8-25-million>.

19. See NICOLE HEMMER, *MESSENGERS OF THE RIGHT: CONSERVATIVE MEDIA AND THE TRANSFORMATION OF AMERICAN POLITICS* 83 (2016).

20. See, e.g., E. J. Montini, *Zeus, Thor, Mars, Ares . . . Arpaio?*, *ARIZONA REPUBLIC*, Oct. 21, 1999, at B.1; *Time to Finish the Norberg Investigation: Inaction Implies Official Cover-Up*, *ARIZONA REPUBLIC*, Oct. 29, 1999, at B.8.

beaten by nine officers who secured him in a restraint chair where he was allowed to suffocate.<sup>21</sup> A jury awarded the Agster family nine million dollars,<sup>22</sup> a figure subsequently adjusted in settlement negotiations.<sup>23</sup> It has been estimated that Maricopa County paid over \$140 million in settlements for wrongful conduct during Joe Arpaio's long rule (1993–2017).<sup>24</sup>

In November 2001, the seriously schizophrenic thirty-six-year-old Eric Vogel chose to do something he only rarely did: he left the home he shared with his mother on urgent business.<sup>25</sup> He wished to see the president of the United States.<sup>26</sup>

## II. SCHIZOPHRENIA

Schizophrenia is an “inability to think normally.”<sup>27</sup> Thought processes are disrupted, delusions occur, hallucinations happen.<sup>28</sup> Schizophrenic individuals “report feeling the loss of the sense of inhabiting their own actions, thoughts, feelings, impulses, bodily sensations, or perceptions, sometimes to the point of feeling these are actually in the possession of some alien being.”<sup>29</sup> The processes of “social cognition” fail or at least become gravely diminished; “community functioning” grows difficult or impossible.<sup>30</sup> In a word, reality itself seems to disappear with the onset of schizophrenia.<sup>31</sup>

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21. See John Doughter, *Death Sentence*, PHOENIX NEW TIMES (Mar. 16, 2006), <https://www.phoenixnewtimes.com/news/death-sentence-6400708>; ANN-MARIE CUSACK, CRUEL AND UNUSUAL: THE CULTURE OF PUNISHMENT IN AMERICA 233 (2009).

22. Gary Grado, *Jury Awards \$9M in Jail Death*, EAST VALLEY TRIBUNE (Mar. 25, 2006), [https://www.eastvalleytribune.com/news/jury-awards-9m-in-jail-death/article\\_e89ea227-f13f-53d4-b0e9-955fea793f1b.html](https://www.eastvalleytribune.com/news/jury-awards-9m-in-jail-death/article_e89ea227-f13f-53d4-b0e9-955fea793f1b.html).

23. See Judi Villa, *Additional Award in Inmate Death*, ARIZONA REPUBLIC, Apr. 3, 2007, at B.1.

24. Laura L. Finley, *Arpaio, Joe (1932- )*, in 1 CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA OF TRENDS AND CONTROVERSIES IN THE JUSTICE SYSTEM 28 (Laura L. Finley, ed., 2017); A.J. Vicens, *Donald Trump's Favorite Anti-Immigrant Sheriff May Finally Lose an Election*, MOTHER JONES (Sept. 30, 2016), <https://www.motherjones.com/politics/2016/09/joe-arpaio-23-year-reign-might-finally-be-coming-end/>.

25. See Robert Nelson, *Torture Chamber*, PHOENIX NEW TIMES (Mar. 14, 2002), <https://www.phoenixnewtimes.com/news/torture-chamber-6413169>.

26. *Wagner v. Cnty. of Maricopa*, 673 F.3d 977, 978 (9th Cir. 2012), *amended by* 747 F.3d 1048 (9th Cir. 2013).

27. LIAH GREENFELD, MIND, MODERNITY, MADNESS: THE IMPACT OF CULTURE ON HUMAN EXPERIENCE 118 (2013).

28. RACHEL E. MILLER AND SUSAN E. MASON, DIAGNOSIS: SCHIZOPHRENIA 40–42 (2d ed., 2011).

29. Serife Tekin, *Looking For the Self in Psychiatry: Perils and Promises of Phenomenology – Neuroscience Partnership in Schizophrenia Research*, in EXTRAORDINARY SCIENCE AND PSYCHIATRY: RESPONSES TO THE CRISIS IN MENTAL HEALTH RESEARCH 249, 249–53 (Jeffrey Poland & Serife Tekin, eds., 2017).

30. Sjoerd J.H. Ebisch et al., *Out of Touch With Reality? Social Perception in First-Episode Schizophrenia*, 8 SOCIAL COGNITIVE AND AFFECTIVE NEUROSCIENCE 394, 394 (2013).

31. See Brendan A. Maher, *Delusions*, in COMPREHENSIVE HANDBOOK OF PSYCHOPATHOLOGY 309, 329 (Henry E. Adams & Patricia B. Sutker, eds., 3d ed., 2004).

In making this observation, one needs to know how any of us comes to an understanding of “reality.” No one disputes that there is an external world. But knowledge of that external world is attained only through the senses,<sup>32</sup> and the data gathered by the senses are in turn interpreted by the brain. Reality, in other words, exists primarily in our heads.

For neurotypical individuals, that reality corresponds more or less to what is really out there, in the external world.<sup>33</sup> For the schizophrenic, however, reality corresponds not to an externally observed, generally agreed-upon world, but to the hallucinations, delusions, obsessions, and fears that inhabit that individual’s brain.<sup>34</sup> To the floridly schizophrenic individual, those mental deceptions, those incessant, unceasing voices, those enveloping apparitions, those urgent and overpowering tactile sensations, are as real as the external reality a neurotypical person experiences, because they are what the schizophrenic’s brain is processing as reality.<sup>35</sup>

And the schizophrenic’s response to the reality he or she is experiencing can be just as compelling as the ways neurotypical individuals react to their worlds. A scene from *A Beautiful Mind*, the film about mathematician John Nash, dramatizes the experience. Nash was portrayed as working with military intelligence attempting to break some intricate numerical codes in an effort to prevent an imminent Soviet invasion of the United States. The scene created the impression Nash was deeply involved in Cold War spycraft. For Nash, the experience was immediate, vivid, and real. He truly believed the fate of humanity hung in the balance, and that was how viewers experienced it.<sup>36</sup> If one watches the segment two or three times, one begins to realize how implausible the scenario was—divisions of Soviet troops pre-positioned across the Canadian border from Maine and Minnesota. But for Nash—and for first-time viewers—the scene is compelling, inescapable reality.

32. See Gerhard Vollmer, *Between Biology and Philosophy: Our Knowledge of the Real World*, in *SENSORY PERCEPTION: MIND AND MATTER* 75, 79 (Friedrich G. Barth et al., eds., 2012).

33. See REGINA PALLY, *THE MIND-BRAIN RELATIONSHIP* 19 (2000).

34. PETER F. LIDDLE, *DISORDERED MIND AND BRAIN: THE NEURAL BASIS OF MENTAL SYMPTOMS* 87–89 (2001).

35. See generally Paul C. Fletcher & Chris D. Frith, *Perceiving is Believing: A Bayesian Approach to Explaining the Positive Symptoms of Schizophrenia*, 10 *NATURE REV. NEUROSCIENCE* 48, 48–58 (2009); Shitij Kapur, *Psychosis as a State of Aberrant Salience: A Framework Linking Biology, Phenomenology, and Pharmacology in Schizophrenia*, 160 *AM. J. OF PSYCHIATRY* 13, 13–23 (2003).

36. See A.O. Scott, *Film Review: From Math to Madness and Back*, *N.Y. TIMES* (Dec. 21, 2011), <https://www.nytimes.com/2001/12/21/movies/film-review-from-math-to-madness-and-back.html> (singling out the military intelligence scene for its depiction of schizophrenia in an otherwise critical review).

If schizophrenics, to a greater or lesser extent, experience alternative versions of reality, it is not surprising that they have abbreviated life spans<sup>37</sup> and have frequent, unfortunate encounters with law enforcement.<sup>38</sup>

### III. THE DEATH OF ERIC VOGEL

Eric Vogel began to show signs of mental disturbance by the age of twelve. He secluded himself from friends and deliberately sought social isolation. He apparently functioned well enough academically to enroll in Arizona State University as a pre-med major, but his actual academic career lasted about a semester. He withdrew from college and returned to his parents' home.<sup>39</sup>

At around the age of twenty, he witnessed the arrest of his father, who was taken by police from the family home. The event left him traumatized. "He no longer could walk from his yard without panic attacks."<sup>40</sup> "From age 20 until the time of his death, his family was aware of only two times that he left the house where he lived with his mother."<sup>41</sup>

The events of September 11, 2001 had an additional traumatizing impact on Vogel. He became convinced that he had an important message to deliver to the president of the United States. His sister concluded that "he was actively delusional."<sup>42</sup> It was while in the grips of this delusion that he decided to leave the home. Sandra Betts, one of Vogel's sisters, testified: "My mother called. I think she used the exact words that Eric cracked up, and he left the house. And I knew that . . . for my mother to use the term 'cracked up' was an admission of something very serious, and the fact that he left was—that never happened."<sup>43</sup>

In pursuit of his delusions, Vogel wandered into a random backyard. The homeowner, frightened that a burglary might be in progress, called the police. The officer who arrived on the scene engaged in a violent struggle with Vogel.<sup>44</sup> Vogel, however, eventually calmed down when he was prom-

37. See Thomas Munk Laursen, *Life Expectancy Among Persons with Schizophrenia or Bipolar Affective Disorder*, 131 SCHIZOPHRENIA RSCH. 101, 101–04 (2011).

38. See Robert Rigg, *Are There No Prisons? Mental Health and the Criminal Justice System in the United States*, 4 U. DENV. J. OF CRIM. L. 103, 111–15 (2014).

39. Plaintiff's Separate Statement of Facts in Support of His Motion for Summary Judgment Re: Claims of Violation of Americans with Disabilities Act, Arizona Vulnerable Adult Statute and 42 U.S.C. § 1983 at 2, *Wagner v. Cnty. of Maricopa*, 673 F.3d 977, 978 (9th Cir. 2012), *amended by* 747 F.3d 1048 (9th Cir. 2013) (No. 10-15501) [hereinafter Plaintiff's Separate Statement] (citing Deposition of Sandra Betts).

40. Robert Nelson, *Torture Chamber*, PHOENIX NEW TIMES (Mar. 14, 2002), <https://www.phoenixnewtimes.com/news/torture-chamber-6413169>.

41. Motion For Summary Judgment RE: A.D.A., A.P.S.A. and Civil Rights Claims at 3, *Wagner*, 673 F.3d at 977.

42. Appellant's Opening Brief at 1, *Wagner*, 673 F.3d at 977.

43. Plaintiff's Separate Statement, *supra* note 39, at 4 (quoting Deposition of Sandra Betts).

44. See Answering Brief at 11–12, *Wagner*, 673 F.3d at 977.

ised that he would be taken to the White House.<sup>45</sup> Vogel was instead taken to the Maricopa County jail.

Vogel's psychosis was immediately apparent to jail personnel. One of the arresting officers, Charles Vath, testified that it was "within my first minute of contact" that he realized Vogel was psychiatrically disturbed.<sup>46</sup> A nurse, Lecty Fream, indicated that it was obvious to her "that he was very paranoid and basically was saying strange things."<sup>47</sup> A psychiatric counselor, Kimberly Whitt, asked Vogel where he thought he was. He "believed he was in the World Trade Center."<sup>48</sup> He believed further that "satellites [were] giving him messages."<sup>49</sup>

A decision was accordingly made to admit Vogel to the psychiatric unit. But a complication arose. Jail policy required Vogel to "dress out," to exchange his clothes for prison garb. And part of dressing out required Vogel to strip off his underpants and to wear specially designated pink underwear.<sup>50</sup>

Joe Arpaio liked to dress his prisoners in pink. "No one wants to wear pink underwear," Arpaio boasted.<sup>51</sup> Grandstanding to the hilt, Arpaio autographed pairs of pink underwear and sold them to the general public.<sup>52</sup> His goal was "degrad[ation] and humiliat[ion]."<sup>53</sup> A journalist visiting Arpaio's jail wrote of the "dehumanization" that he witnessed, and "even a whiff of something annihilationist."<sup>54</sup>

The demand that detainees wear pink underwear was just one small feature of Arpaio's effort to destroy the humanity of those who had the misfortune to cross his path.<sup>55</sup> Arpaio saw himself as playing a role—the larger-than-life frontier sheriff operating barely within the margin of the law.<sup>56</sup> In reality, he had transformed himself, and the office he claimed to

45. *Wagner*, 673 F.3d at 978.

46. Plaintiff's Separate Statement, *supra* note 39, at 5 (quoting Police Report).

47. Plaintiff's Separate Statement, *supra* note 39, at 7 (quoting Deposition of Lecty Fream).

48. Plaintiff's Separate Statement, *supra* note 39, at 13 (quoting Deposition of Kimberly Whitt).

49. Plaintiff's Separate Statement, *supra* note 39, at 14 (quoting Deposition of Kimberly Whitt).

50. *Wagner*, 673 F.3d at 979.

51. Sandy Banisky, *Sheriff Joe Takes Great Pride in His Jail's Lean-and-Mean Reputation*, LOS ANGELES TIMES (Mar. 10, 1996), <https://www.latimes.com/archives/la-xpm-1996-03-10-me-45151-story.html>.

52. *Id.*

53. DAVID L. ALTHEIDE, *CREATING FEAR: THE CONSTRUCTION OF CRISIS* 4 (2002).

54. Finnegan, *supra* note 6.

55. See John Dickerson, *Inhumanity Has a Price*, PHOENIX NEW TIMES (Dec. 20, 2007), <https://www.phoenixnewtimes.com/news/inhumanity-has-a-price-6432212>.

56. See Steve Schmidt, *Tough Talk From Arizona's Sheriff Joe Arpaio*, SAN DIEGO UNION-TRIBUNE (Jan. 20, 2011), <https://www.sandiegouniontribune.com/news/border-baja-california/sdut-would-arizonas-sheriff-joe-arpaio-hold-much-sway-s-2011jan20-story.html>.



serve, into something very ugly.<sup>57</sup> Certainly, he had become something deeply, profoundly, anti-American.

Eric Vogel had remained relatively calm during the first hours of confinement, even “taking his medications as directed.”<sup>58</sup> Vogel, however, was very fastidious about his clothing. He was, Sandra Betts reported, “very modest. . . . [H]is collar would be buttoned all the way up to the top button. Never saw him in shorts.”<sup>59</sup> Paranoid and prudish, he was not about to comply with the demand to change into Arpaio’s pink underpants.

A struggle ensued when Arpaio’s jailers forced the issue. Officers stripped him of his clothing, placed him in a restraint chair, and “got the pink underwear on him.”<sup>60</sup> All the while, Vogel screamed that he was being sexually assaulted.<sup>61</sup> He yelled, “[y]ou’re taking my clothes off so you can rape me.”<sup>62</sup> The event left Vogel extraordinarily traumatized. Vogel spent much of his confinement in the jail’s psychiatric unit hiding under his bed.<sup>63</sup>

Following his release from jail, Vogel gave vivid accounts both to his mother and to another sister, Yvon Wagner, of what he believed was a prison rape. He told Wagner that “[h]e felt one of the officers attempted to put his penis in his mouth and that he had to keep his mouth so tight that he bruised his outer lips.”<sup>64</sup> The pink underwear had an especially negative impact on Vogel, causing him to “believe[ ] that [it] was the precursor to a sexual act on him.”<sup>65</sup>

Less than three weeks later, Vogel was riding in his mother’s car when she was involved in a minor traffic accident. Fearing arrest and another jailhouse “rape,” Vogel ran away from the scene as fast as he could. He ran frantically for a distance of four or five miles, entered cardiac arrhythmia, and died.<sup>66</sup>

Vogel’s mother brought suit on a variety of state and federal theories, including tort, deprivation of due process, and other violations of the civil rights statutes.<sup>67</sup> When Vogel’s mother died shortly after bringing her complaint, her daughter, Eric’s sister Yvon Wagner, succeeded her as plain-

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57. *Sheriff Runs Female Chain Gang*, CNN (Oct. 29, 2003, 12:01 PM), <https://www.cnn.com/2003/US/Southwest/10/29/chain.gang.reut/>.

58. Appellant’s Opening Brief, *supra* note 42, at 2.

59. Plaintiff’s Separate Statement, *supra* note 39, at 3 (quoting Deposition of Sandra Betts).

60. Appellant’s Opening Brief, *supra* note 42, at 2.

61. Appellant’s Opening Brief, *supra* note 42, at 18–19.

62. Report or Affidavit of Celia Drake, Ph.D. at 4, *Wagner v. County of Maricopa*, 673 F.3d 977 (9th Cir. 2012), *amended by* 747 F.3d 1048 (9th Cir. 2013) (No. 10-15501).

63. Appellant’s Opening Brief, *supra* note 42, at 19.

64. Appellant’s Opening Brief, *supra* note 42, at 19.

65. Appellant’s Opening Brief, *supra* note 42, at 2.

66. Appellant’s Opening Brief, *supra* note 42, at 21.

67. Appellant’s Opening Brief, *supra* note 42, at 3–4.

tiff.<sup>68</sup> Crucial to the cause of action's success was establishing Vogel's state of mind at the time he fled the officers on the day of his death. What caused him to be so overwhelmed by fear that he ran himself into a fatal arrhythmia?

#### IV. THE THEORY OF THE APPEAL

What was Vogel's state of mind at the time he ran away so frantically? Yvon Wagner, who had spoken with Vogel in the days following his arrest and gleaned further information from their mother, wanted to answer this question for the court. She was prepared to testify that Vogel had come to believe that he had experienced a vicious sexual assault while in custody.<sup>69</sup>

The pink underwear in particular had a psychologically damaging effect in that it reinforced the idea that he had been raped. Wagner testified: "I remember him saying that they were going to have a party, and they were putting pink underwear on him to have that party."<sup>70</sup> Vogel thus had a deep and unshakeable fear that he would experience another assault should he ever have to deal once more with Maricopa County deputies.<sup>71</sup>

Arpaio's lawyers—who came from the law office of NFL official Ed Hochuli—objected. They alleged two main difficulties with Wagner's proposed testimony. First was the question whether she was competent to testify as to Vogel's state of mind.<sup>72</sup> Federal Rule of Evidence 701 provides that testimony by lay witnesses must be "rationally based on the witness's perception."<sup>73</sup> Drawing on case law, Arpaio's lawyers elaborated: Wagner's testimony "must be based on concrete facts within the witness's own observation and recollection."<sup>74</sup>

Arpaio's counsel continued. Wagner's conversations with Vogel could not be admitted for a second reason as well. They were hearsay. Wagner wished to testify to Vogel's state of mind, but his state of mind had no relevance as to whether he suffered a violation of his constitutional rights.<sup>75</sup> What mattered was not Vogel's perceptions of what occurred, but the actual events themselves. And it was plain, they declared, that Vogel's forcible "dress-out" did not violate constitutional norms.<sup>76</sup>

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68. *Wagner v. County of Maricopa*, 673 F.3d 977 (9th Cir. 2012), *amended by* 747 F.3d 1048 (9th Cir. 2013).

69. *Id.* at 980.

70. Plaintiff's Separate Statement, *supra* note 39, at 29.

71. Plaintiff's Separate Statement, *supra* note 39, at 29.

72. Defendant's Motion In Limine #4 Re: Hearsay Statements and Improper Testimony at 2, *Wagner*, 673 F.3d 977 (No. 10-15501).

73. FED. R. EVID. 701.

74. Defendant's Motion In Limine #4 Re: Hearsay Statements and Improper Testimony, *supra* note 72, at 3.

75. Defendant's Motion In Limine #4 Re: Hearsay Statements and Improper Testimony, *supra* note 72, at 4.

76. Defendant's Motion In Limine #4 Re: Hearsay Statements and Improper Testimony, *supra* note 72, at 4.

For the plaintiff, the central question was causation. Did Joe Arpaio's pink underwear policy, and its implementation by a jailhouse staff that was well aware of Vogel's mental illness yet treated him with deliberate indifference, constitute legally cognizable causation?<sup>77</sup>

Wagner's testimony was crucial on this point because the injury Vogel suffered had nothing to do with whether he was actually raped by Arpaio's jailhouse staff. It was his perception of being raped, which was caused by the forcible "dress-out."<sup>78</sup> Had the staff shown due regard for Vogel's obvious psychosis,<sup>79</sup> they would not have forced the issue of the pink underwear, and he would not have developed the fixed and firm delusion that he had been sexually assaulted. And if he had not believed that he was the victim of a violent rape, he would not have gone on his fatal run.<sup>80</sup> "He was paranoid to begin with," Wagner indicated, and the jailhouse experience gravely worsened his condition.<sup>81</sup> Wagner was an expert as to her brother's "state of mind," her counsel declared to the court,<sup>82</sup> and her testimony should not be disqualified as hearsay since the matter being alleged was not that Vogel was in fact raped but that he believed he had been.<sup>83</sup>

Both Wagner and the county cited *United States v. Emmert*, a Ninth Circuit decision, as authority for their respective positions on the hearsay question. John Noonan had served on the appellate panel that decided *United States v. Emmert*, but he did not author the opinion.<sup>84</sup> The case involved an entrapment defense to charges of conspiracy to distribute cocaine. Quoting earlier authority, the *Emmert* court wrote: "[T]he state of mind exception [to the hearsay rule] does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind."<sup>85</sup>

The county argued that *Emmert's* language should be applied in all its breadth. Evidence proving the simple fact that Vogel was "scared," they asserted, might be admissible, "but testimony about why he had a particular state of mind or what he might have believed induced the state of mind was not."<sup>86</sup>

Wagner's attorney hoped to distinguish the case: the defendant in *Emmert* sought to introduce evidence that he felt intimidated by government

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77. Appellant's Reply Brief at 10–12, *Wagner*, 673 F.3d at 977 (No. 10-15501).

78. Appellant's Opening Brief, *supra* note 42, at 23.

79. Plaintiff's Trial Memorandum Re Disputed Issues of Law at 3, *Wagner*, 673 F.3d at 977 (No. 10-15501).

80. Appellant's Reply Brief, *supra* note 77, at 19–20.

81. Plaintiff's Separate Statement, *supra* note 39, at 30.

82. Appellant's Reply Brief, *supra* note 77, at 18.

83. Appellant's Reply Brief, *supra* note 77, at 15–16.

84. *United States v. Emmert*, 829 F. 2d 805, 806 (9th Cir. 1987).

85. *Id.* at 810 (quoting *United States v. Cohen*, 631 F.2d 1223, 1225 (1981)).

86. Answering Brief, *supra* note 44, at 39.

agents and so entrapped into consummating the illicit narcotics transaction. Thus the issue in *Emmert* was the “‘truth’ of the reason for the state of mind.”<sup>87</sup> Wagner’s case did not depend on whether Vogel was actually raped—only on whether Vogel believed, in his weakened mental state, that he had been.<sup>88</sup> It would now be up to Judge John Noonan to place the appropriate gloss on the earlier opinion.

Earl H. Carroll, the federal district court judge who heard the case, was a naval veteran of World War II and a graduate of the University of Arizona School of Law.<sup>89</sup> For a while in the 1960s, he represented the City of Tombstone, Arizona, and he was appointed to the federal bench by President Jimmy Carter.<sup>90</sup>

At pretrial conference, Carroll expressed a dim view of the plaintiff’s claims. Conceding that he “may be subject to . . . reversal,” he declared that “it’s very unlikely that we’re going to have pink underwear as an issue in this case.”<sup>91</sup> He subsequently limited the introduction of evidence concerning pink underwear or Vogel’s belief that he was raped as unfairly prejudicial to Arpaio’s defense, and he further ruled that Yvon Wagner’s testimony concerning Vogel’s state of mind was inadmissible hearsay.<sup>92</sup>

He explained his theory of the case to the litigants at pretrial conference: Vogel was “a tragic person.”<sup>93</sup> His mother failed to “giv[e] him medical treatment . . . that might have been helpful to him.”<sup>94</sup> And he limited the admissibility of evidence to fit this account of the case.

## V. “IF YOU PRICKED HIM, HE BLED”

So restricted, Yvon Wagner lost at trial and appealed to the Ninth Circuit. The case came before a panel that included John Noonan, Frederic Block, and N. Randy Smith. Block was a senior federal district court judge from Brooklyn, appointed to the bench by Bill Clinton, sitting by designation. He had deep judicial experience, including the chance to preside at the criminal trials of several prominent members of organized crime.<sup>95</sup> Smith had been on the federal appellate bench since 2007. Prior to his judicial career he had been the chair of the Idaho State Republican Party and had

87. Appellant’s Reply Brief, *supra* note 77, at 16.

88. Appellant’s Reply Brief, *supra* note 77, at 16.

89. *Hon. Earl H. Carroll*, ARIZONA REPUBLIC, Feb. 9, 2017, at 1.

90. *Id.*

91. Reporter’s Transcript of Proceedings, Pretrial Conference at 7, *Wagner v. County of Maricopa*, 673 F.3d 977 (9th Cir. 2012), *amended by* 747 F.3d 1048 (9th Cir. 2013) (No. 10-15501).

92. *Wagner*, 673 F.3d at 979.

93. Reporter’s Transcript of Proceedings, Pretrial Conference, *supra* note 91, at 7.

94. Reporter’s Transcript of Proceedings, Pretrial Conference, *supra* note 91, at 7.

95. FREDERIC BLOCK, DISROBED: AN INSIDE LOOK AT THE LIFE AND WORK OF A FEDERAL TRIAL JUDGE 251–314 (2013).

practiced corporate law, representing the likes of Du Pont Corporation and J.R. Simplot.<sup>96</sup>

The panel split two to one in Wagner's favor, Block voting with Noonan to constitute a majority. Noonan identified two major issues of relevance. First was the hearsay question. The federal hearsay rule permitted the introduction of evidence regarding "the declarant's then-existing state of mind" but excluded "statement[s] of memory or belief to prove the fact remembered or believed."<sup>97</sup>

Could Wagner's testimony be admitted under this standard? There were two underlying facts, as Noonan saw it, for which Wagner's testimony was unneeded. First was the forcible "dress-out" into the pink underwear. That event indisputably occurred. Second was the allegation of gang rape. Equally indisputably, no such event took place.<sup>98</sup>

But what mattered was not whether Vogel was really sexually assaulted, but whether he, in a delusional state, believed that he had been. And here Wagner's testimony was crucial and directly probative: "[Wagner] had personal knowledge of how Vogel had been impacted by the incident. She testified as a percipient of what she observed."<sup>99</sup> *Emmert* was thus distinguishable. The statements the defendant in *Emmert* wished to introduce went directly to the defense of entrapment. On the other hand, whether Vogel was actually raped was immaterial for the success or failure of his case.<sup>100</sup> What mattered was his perception of the event.

The second major issue was the impact Arpaio's pink underwear policy had on the deceased. "When a color of such symbolic significance is selected for jail underwear, it is difficult to believe that the choice of color was random. The County offers no penological reason, indeed no explanation whatsoever for its jail's odd choice."<sup>101</sup> If the color choice lacked justification, so also did the decision to forcibly dress Vogel in the pink underwear. Noonan, in fact, proposed on remand that the trial court consider whether "to apply this procedure automatically to a man known by his jailers to be in need of psychiatric treatment was itself a violation of due process."<sup>102</sup>

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96. Dan Levine, *N. Randy Smith*, THE RECORDER, Oct. 7, 2008, at 1–2; Joni Kirk, *University of Idaho Commencement in Moscow*, UNIVERSITY OF IDAHO NEWS ARCHIVE (Apr. 24, 2009), <https://www.lib.uidaho.edu/digital/uinews/item/university-of-idaho-commencement-in-moscow.html>. Cf. *Brower v. E.I. Du Pont de Nemours and Co.*, 117 Idaho 780, 780 (1990) (Smith as Attorney of Record for Du Pont).

97. FED. R. EVID. 803(3).

98. *Wagner v. County of Maricopa*, 673 F.3d 977 (9th Cir. 2012), *amended by* 747 F.3d 1048 (9th Cir. 2013).

99. *Id.*

100. *Id.* at 980–81.

101. *Id.* at 981.

102. *Id.* at 983.

Smith dissented. A major focus of his dissent was to challenge Noonan's application of the hearsay rule. He reminded the court majority that the Ninth Circuit favored a "significantly deferential" approach in determining whether a trial court had committed reversible error.<sup>103</sup> It did not belong to the appeals court to reverse simply because the lower court had erred.<sup>104</sup> Smith could have based his dissent on that ground alone, had he chosen. His argument could have been that reasonable minds can disagree on whether Wagner's testimony was admissible and so the majority should show due deference to the inferior tribunal's determination.

But Smith was eager to defend the substance of the lower court's ruling. For Smith, Wagner's testimony "was offered to prove the truth of the matter asserted—i.e., that Vogel believed the events he described happened."<sup>105</sup> Smith ran through a series of suppositions in an effort to prove his point. Suppose that Wagner offered her testimony to establish that Vogel "was forcibly undressed by detention officers," or that "he was dressed in pink underwear and slippers," or that "he called out to other inmates for help."<sup>106</sup> Wagner's knowledge of each of these events would have been the product of subsequent conversations she had with Vogel, and her testimony on each of these points would have been appropriately disallowed.<sup>107</sup>

Why then should Vogel's beliefs about what had happened be treated any differently? "[Vogel] *felt* he was being raped."<sup>108</sup> "[He] *felt* one of the officers attempted to put his penis in his mouth."<sup>109</sup> "[He] *believed* he was being raped."<sup>110</sup> Smith considered the two sets of suppositions indistinguishable.

Noonan, however, succeeded in distinguishing the two sets of suppositions, and he did so on the basis of a sophisticated understanding of the human person. "If you pricked him, he bled," Noonan wrote, referencing Vogel's common humanity through an appeal to Shylock's protest in the *Merchant of Venice*.<sup>111</sup> Common humanity, Noonan implied, required respect be shown to Vogel, as he really was. He was "disoriented, paranoid, and psychotic."<sup>112</sup> It was his traumatized state of mind that was at issue, not

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103. *Id.* at 984 (Smith, J., dissenting) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009)).

104. *Wagner*, 673 F.3d at 985 (Smith, J., dissenting).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Wagner*, 673 F.3d at 985 (Smith, J., dissenting).

111. *Id.* at 981 (majority opinion); William Shakespeare, *THE MERCHANT OF VENICE*, Act 3, Scene 1. (Barbara A. Mowat & Paul Werstine eds.) ("I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? . . . If you prick us, do we not bleed?").

112. *Wagner*, 673 F.3d at 979.

whether he was actually, physically raped at the time of the “dress out.”<sup>113</sup> Wagner’s testimony was “offered to show his state of mind at the time of the conversation.”<sup>114</sup> “Exclusion of this evidence was erroneous and fatally prejudicial.”<sup>115</sup>

The decision had a significant impact in popular media.<sup>116</sup> About eighteen months after the original opinion was handed down, the Ninth Circuit in December 2013 published an amended version.<sup>117</sup> Gone was a large section from the first opinion that addressed the exclusion of expert witness testimony. Noonan’s language about the pink underwear could still be found, though in somewhat edited form.<sup>118</sup> Still, the holding was reaffirmed. And Noonan added an important introduction to the case that served to frame the essential issue presented by the case: “The central figure in this case, Eric Vogel, suffered from mental illness. Our system of laws is administered by rational human beings. It has always been a challenge to the legal system to interact with the irrational.”<sup>119</sup> The case was eventually settled.<sup>120</sup>

## VI. OBSERVATIONS

Four features of the *Wagner* decision bear importantly in understanding how John Noonan resolved cases and controversies. First is the centrality of the human person. *Wagner*’s outcome really turned on differing conceptions of the human person. Randy Smith, the dissenting judge, took a flat, dull, formalist, almost abstract view of Vogel. He was in jail, he was forcibly stripped, and he recalled certain discrete occurrences, not all of them corresponding to what actually happened. Smith never entertained the larger questions. He never asked himself, for instance, how would a deluded and paranoid person explain what had just happened to him? Or, what kind of continuing damage might the forcible change into pink underwear inflict on someone with Vogel’s susceptibilities?

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113. *Id.* at 981.

114. *Id.*

115. *Id.*

116. Carol J. Williams, *New Trial Ordered In Death of Inmate Forced to Wear Pink Underwear*, L.A. TIMES (Mar. 8, 2012), <https://www.latimes.com/local/la-xpm-2012-mar-08-la-me-0308-underwear-death-20120308-story.html>; Dustin Volz, *New Trial Ordered In Arpaio’s Pink Underwear Policy For Inmates*, ARIZONA CAPITOL TIMES, (Mar. 8, 2012), <https://azcapitoltimes.com/news/2012/03/08/new-trial-ordered-over-arpaio%E2%80%99s-pink-underwear-policy-for-inmates/>; Ian Milhiser, *Reagan-Appointed Judge Suggests Sheriff Arpaio’s Pink Underwear Is Unconstitutional*, THINK PROGRESS (Mar. 9, 2012), <https://archive.thinkprogress.org/reagan-appointed-appeals-judge-suggests-sheriff-arpaios-pink-underwear-is-unconstitutional-77cf8cbc420d/>.

117. *Wagner v. County of Maricopa*, 747 F.3d 1048, 1049 (9th Cir., 2013).

118. *Id.* at 1053.

119. *Id.* at 1050.

120. Debra Cassens Weiss, *Maricopa County To Settle Pink Underwear Case; Suit Blamed Policy In Inmate’s Death*, ABA JOURNAL (Sept. 9, 2014), [https://www.abajournal.com/news/article/maricopa\\_county\\_to\\_settle\\_pink\\_underwear\\_case\\_suit\\_blamed\\_policy\\_in\\_inmates/](https://www.abajournal.com/news/article/maricopa_county_to_settle_pink_underwear_case_suit_blamed_policy_in_inmates/).

Noonan could address questions like these because he began with a more expansive and empathetic account of the person. He made room in his mental universe for emotionally traumatized persons like Vogel because he could imaginatively put himself in their shoes. He knew that putting oneself in the position of another human being is the beginning of all empathetic social inquiry.<sup>121</sup> And in the *Wagner* case, that empathy took the form of recognizing that even the fears of a schizophrenic were worthy of respect.

Second, this opinion has a notable figure in the background, and that is Joe Arpaio. His name is mentioned only twice in the opinion. But his abuse of power continuously informs its outcome. His pink underwear policy was condemned as indefensible. Noonan never denounced Arpaio as a vigilante, or as lawless. But the opinion makes abundantly clear that his name must never be associated with justice.

A third notable characteristic of this decision is the way Noonan used rules of law. Consider the way he applied the hearsay rule as interpreted by *Emmert*. The language in *Emmert* was far reaching. A literalist might have applied the language mechanically to exclude Wagner's testimony, as Judge Smith did in his dissent. But John Noonan was no literalist, and his jurisprudence was never mechanical. A limiting construction was placed on the rule, and careful distinctions drawn, sensitive to the peculiar features of the case.

Finally, it is plain that Noonan's judicial work was characterized by a sophisticated if unspoken theory of substantive justice. He was committed to the idea that the rules and principles of the positive law must be interpreted coherently, and that their ultimate end is the doing of justice in particular cases. Standing behind this commitment, giving it force and meaning, was Noonan's deep awareness of the whole sweep of the Western moral tradition. There have been few as conversant with this tradition as John Noonan.<sup>122</sup>

Two aphorisms of the Roman jurist Ulpian come to mind. *Ius*, "right" (law), he said, is the *ars boni et aequi*, the "art of the good and the just."<sup>123</sup> And *iustitia*, "justice," is *constans et perpetua voluntas ius suum cuique tribuendi*, "the constant and perpetual will of giving to each what is due."<sup>124</sup> Judging for Noonan was an art. Every judicial opinion was in reality a work of art, a dense tapestry woven from principles of justice, rules, and facts. And it truly was a giving to *cuique*—to each and every one, individually, discretely—what was that person's just deserts based on the unique circum-

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121. JOHN T. NOONAN JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS, 156–57 (2002).

122. See, e.g., Charles J. Reid, Jr., *The Fundamental Freedom: Judge John T. Noonan, Jr.'s Historiography of Religious Liberty*, 83 MARQ. L. REV. 367, 367–74 (1999) (summarizing Noonan's scholarship in legal history).

123. Dig. 1.1.1 (Ulpian, De iustitia et iure 1).

124. Dig. 1.1.10 (Ulpian, De iustitia et iure 1).



stances of the case. The fulfillment of this responsibility, for John Noonan, is the role of the truly great judge, and it is on vivid display in *Wagner v. Maricopa County*.