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## Catholics in Public Life: Judges, Legislators, and Voters

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**Catholics in Public Life: Judges, Legislators, and Voters**  
**Gregory A. Kalscheur, S.J.\***

Confusion often accompanies contemporary discussion of questions related to Catholic participation in public life.<sup>1</sup> It does so, in part, because participants in such discussions often fail to recognize that Catholics participate in public life in different ways that give them different sorts of roles. There are Catholic legislators and executive officials, there are Catholic voters, there are Catholic judges, and, within the judicial branch, there are trial judges and appellate judges, working in both state courts and federal courts.

All Catholics involved in public life – whether as judges, legislators or voters – have a moral obligation to promote the common good through their participation in public life.<sup>2</sup> But I do not believe we can coherently talk about the

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<sup>1</sup> See, e.g., James L. Heft, S.M., *US Catholics and the Presidential Election: Abortion and Proportionate Reasons*, 86 NEW BLACKFRIARS 259, 259 (2005) (“A Jesuit, who is also a moral philosopher, recently remarked, ‘I have never before encountered ... such intense concern and confusion over faith and politics as I do nowadays.’”) (quoting John F. Kavanaugh, S.J., *Catholic Consciences*, AMERICA 7 (July 19-26, 2004)).

<sup>2</sup> See, e.g., John Paul II, *Christifideles Laici* (On the Vocation and the Mission of the Lay Faithful in the Church and in the World) #42 (1988), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_30121988\\_christifideles-laici\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_30121988_christifideles-laici_en.html) (“In order to achieve their task directed to the Christian animation of the temporal order, in the sense of serving persons and society, the lay faithful *are never to relinquish their participation in ‘public life’*, that is, in the many different economic, social, legislative, administrative and cultural areas, which are intended to promote organically and institutionally the *common good*.... [E]very person has a right and a duty to participate in public life, albeit in a diversity and complementarity of forms, levels, tasks and responsibilities.”); Administrative Committee of the U.S. Conference of Catholic Bishops, *Faithful Citizenship: A Catholic Call to Political Responsibility* 7-8 (2003); see also Benedict XVI, *Sacramentum Caritatis* #83, 36 ORIGINS 629, 652 (2007) (“[A] public witness to our faith” is called for from “all the baptized, yet it is especially incumbent upon those who, by

questions sometimes raised about Catholic participation in public life without recognizing that the different roles played by Catholic public officials call them to make a range of distinct sorts of decisions. These different sorts of decisions give rise to complex sets of moral questions, which cannot be answered with a general, sound-bite response. In this Essay, I will try to bring some clarity to the confusion by focusing attention on one public role played by Catholics, that of the judge. Along the way, I hope also to shed some light on the questions raised by the different public roles played by legislators and voters.

The media focused attention on the question of the role of the Catholic judge in the wake of the appointment of two Catholics, John Roberts and Samuel Alito, to the U.S. Supreme Court. A lively discussion of the Catholic faith of Chief Justice John Roberts erupted shortly after then-Judge Roberts' nomination to the Court. The controversy was sparked by a Los Angeles Times column by Professor Jonathon Turley of the George Washington University Law School. The column described a conversation that took place between Judge Roberts and another Catholic public official, Senator Richard Durbin of Illinois. Senator

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virtue of their social or political position, must make decisions regarding fundamental values such as ... the promotion of the common good in all its forms.”). As David Hollenbach, S.J., has noted, the concept of the common good is unfamiliar – perhaps “nearly incomprehensible” – to many Americans today. David Hollenbach, S.J., *THE COMMON GOOD AND CHRISTIAN ETHICS* xiii (2002). The concept of the common good must not be conflated with “the largely economic and utilitarian concept of the general welfare....[T]his kind of utilitarian standard pays little or no attention to how [the] overall sum [of economic welfare] is distributed among the members of society.” *Id.* at 7. In contrast, the common good “embraces the sum of those conditions of social life by which individuals, families, and groups can achieve their own fulfillment in a relatively thorough and ready way.” *Pastoral Constitution on the Church in the Modern World*, in *THE DOCUMENTS OF VATICAN II* 284 (Walter M. Abbot, S.J., gen. ed., 1966); *see also* John Paul II, *Christifideles Laici*, *supra* note 2, at #42 (“Public life on behalf of the person and society finds its *basic standard in the pursuit of the common good*, as the good of *everyone* and as the good of each person taken as a *whole*....”).

Durbin is said to have asked Judge Roberts the following question: “what would [you] do if the law required a ruling that [the Catholic] church considers immoral?” Professor Turley described Judge Roberts’ response in these words: “Renowned for his unflappable style in oral argument, Roberts appeared nonplused and, according to sources in the meeting, answered after a long pause that he would probably have to recuse himself.”<sup>3</sup>

Turley went on to characterize Roberts’ response as “the wrong answer” to Durbin’s question. The answer was wrong, Turley explained, because “[i]n taking office, a justice takes an oath to uphold the Constitution and the laws of the United States. A judge’s personal religious views should have no role in the interpretation of the laws.”<sup>4</sup> Turley gave Roberts credit for not saying that his faith would control his legal judgment in the sort of case Durbin proposed, but he did express the fear that, “if [Roberts’] were to recuse himself on such issues as abortion and the death penalty, it would raise the specter of an evenly split Supreme Court on some of the nation’s most important cases.”<sup>5</sup> While Senator

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<sup>3</sup> Jonathan Turley, *The Faith of John Roberts*, L.A. TIMES, July 25, 2005, at B11.

<sup>4</sup> *Id.* The proper role that religious values should play in judicial decision making (i.e., the proper role that religious values should play in the process by which a judge comes to decide what the law actually means and demands in a given case) is a question beyond the scope of this Essay. Indeed, it is a question that is significantly different than the question that Durbin actually asked Roberts. Durbin’s exchange with Roberts is really concerned with the following question: what should a morally conscientious judge do when the law as the judge interprets it is truly unjust and the action that the law requires of the judge in a given case is truly in conflict with the conscientious convictions of the judge? Many scholars have considered the distinct question of the role that religious values should play in judicial decision making. See, e.g., Teresa S. Collett, “*The King’s Good Servant, but God’s First*”: *The Role of Religion in Judicial Decisionmaking*, 41 S. TEX. L. REV. 1277 (2000); Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 MARQ. L. REV. 537 (1998); MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 102-04 (1997); *id.* at 155 n. 141 (citing a range of scholarship discussing the issue); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 141-50 (1995).

<sup>5</sup> Turley, *supra* note 3.

Durbin's office has disputed the accuracy of Turley's description of the conversation,<sup>6</sup> Turley's account of Durbin's question and Roberts' response fueled debate across the political spectrum about the proper relationship between Roberts' faith and judicial decision making in the weeks leading up to the Roberts confirmation hearing.

John Roberts is now Chief Justice of the United States, and, with the addition of Samuel Alito to the Court, there is now, for the first time in U.S. history, a Catholic majority on the Supreme Court. Five of the currently sitting justices – Chief Justice Roberts, Justice Alito, along with Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas – are Roman Catholics. Because the Church offers moral teaching with respect to many issues that are likely to come before the Court, it makes sense to think carefully about the issues raised by Professor Turley.

But contrary to the position taken by Professor Turley, I think John Roberts gave the right answer to Senator Durbin's question. Judges whose judicial role requires them to perform an action in a particular case that their religiously informed conscience tells them is immoral might indeed have to recuse themselves.<sup>7</sup> When a judge's moral obligation to avoid culpable cooperation with evil prevents the judge from doing something that the law

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<sup>6</sup> See David D. Kirkpatrick, *Skirmish Over a Query About Roberts's Faith*, N.Y. TIMES, July 26, 2005, at A13.

<sup>7</sup> Cf. Avery Cardinal Dulles, S.J., *Catholic Social Teaching and American Legal Practice*, 30 FORDHAM URB. L.J. 277, 288 (2002) ("If the existing law is truly contrary to the conscientious convictions of the judge, the judge may have to recuse herself rather than cooperate in a morally evil action.").

requires be done in a particular case, then the judge's legal obligation to discharge his duties impartially directs him to disqualify himself from participating in the case.<sup>8</sup> At the same time, I do not believe that these general principles, properly understood, lead to the troublesome consequences that Professor Turley seems to imagine. We should not too quickly assume that there are a large number of situations in which a Catholic judge's fidelity to his or her conscience will require the judge to refuse to fulfill their judicial duties in a particular case, and I think it is highly unlikely that such a situation will present itself in the context of Supreme Court adjudication.

The analysis that leads to this conclusion moves through three steps. Part I of the Essay will provide some of the context behind the controversy over John Roberts' Catholicism. In particular, it will focus attention on a critical distinction that is often overlooked in debates about the place of faith in public life: the distinction between the role of the legislator and the role of the judge. Part II will then discuss the framework of moral analysis that we should use to assess

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<sup>8</sup> See 28 U.S.C. § 455:

- (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:
  - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

See also John H. Garvey and Amy V. Coney [Barrett], *Catholic Judges in Capital Cases*, 81 MARQUETTE L. REV. 303, 331-50 (1998) (discussing application of the recusal statute in the context of capital cases); cf. Rebekah L. Osborn, Current Development, *Beliefs on the Bench: Recusal for Religious Reasons and Model Code of Judicial Conduct*, 19 Geo. J. Legal Ethics 895, 897 (2006) (arguing that the ABA Model Code of Judicial Conduct "effectively and appropriately addresses any concern [about the influence of judges' religious beliefs on their decision making] by imposing an obligation to evaluate any potential bias while leaving recusal to the judge's discretion").

whether there is a conflict between the demands of a judge's conscience<sup>9</sup> and the demands of the law that might force the judge to withdraw from a case. Moral theologians call this analytical framework the principle of cooperation with evil. Part III will then apply that principle in the context of three cases, two involving abortion and the other the death penalty, that arguably present a conflict between a judge's conscience and the law.

### I.

To begin, we need to focus a bit on the wider context that made the exchange between Senator Durbin and Judge Roberts such a lightning rod for controversy. The first relevant element of that context is the Doctrinal Note on the Participation of Catholics in Political Life that was issued by the Vatican's

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<sup>9</sup> The Catholic Church teaches that "[a] human being must always obey the certain judgment of his conscience." CATECHISM OF THE CATHOLIC CHURCH [hereinafter CCC] #1800; *see also Declaration on Religious Freedom*, in THE DOCUMENTS OF VATICAN II 681 (Walter M. Abbot, S.J., ed., 1966) ("In all his activity a man is bound to follow his conscience faithfully, in order that he may come to God, for whom he was created. It follows that he is not to be forced to act in a manner contrary to his conscience. Nor, on the other hand is he to be restrained from acting in accordance with his conscience, especially in matters religious."). *See generally* CCC ##1776-1802 (discussing the moral conscience). Conscience must not, however, be understood simply as the right to do whatever one wants. *See, e.g.*, John Henry Newman, *A Letter Addressed to His Grace the Duke of Norfolk on Occasion of Mr. Gladstone's Recent Expostulation*, in CONSCIENCE, CONSENSUS, AND THE DEVELOPMENT OF DOCTRINE 453 (Commentary and Notes by James Gaffney, 1992) (Conscience must be understood "not as a fancy or an opinion, but as a dutiful obedience to what claims to be a divine voice speaking within us."); *id.* at 450 ("Conscience has rights because it has duties; but in this age, with a large portion of the public, it is the very right and freedom of conscience to dispense with conscience, to ignore a Lawgiver and Judge, to be independent of unseen obligations."). The duty to follow one's conscience is rooted in the duty to search for the truth and the obligation to form one's conscience well. *See* Gregory A. Kalscheur, S.J., *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 SO. CAL. INTERDISCIPLINARY L.J. 9-13 (2006); *Declaration on Religious Freedom*, *supra*, at 679 ("[A]ll men should be at once impelled by nature and also bound by a moral obligation to seek the truth .... They are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth."); CCC, *supra*, ##1783-1785; *see also* Joseph Cardinal Ratzinger, *Conscience and Truth*, in ON CONSCIENCE (National Catholic Bioethics Center, 2007), at 22 ("The reduction of conscience to subjective certitude betokens at the same time a retreat from the truth."); *id.* at 25 ("Conscience for Newman does not mean that the subject is the standard vis-à-vis the claims of authority in a truthless world .... Much more than that, conscience signifies the perceptible and demanding presence of the voice of truth in the subject himself. It is the overcoming of mere subjectivity in the encounter of the inferiority of man with the truth from *God*.").

Congregation on the Doctrine of the Faith in November of 2002.<sup>10</sup> The Doctrinal Note reminds Catholics involved in public life that “a well-formed Christian conscience does not permit one to vote for a political program or an individual law which contradicts the fundamental contents of faith and morals.”<sup>11</sup> In particular, the Note states that “those who are directly involved in lawmaking bodies have a ‘grave and clear obligation to oppose any law that attacks human life. For them, as for every Catholic, it is impossible to promote such laws or to vote for them.”<sup>12</sup> As the Note explains, “[w]hen political activity comes up against moral principles that do not admit of exception, compromise or derogation, the Catholic commitment becomes more evident and laden with responsibility.”<sup>13</sup> Finally, the Note asserts that Catholic participation in political life raises “the lay Catholic’s duty to be morally coherent.” This duty is “found within one’s conscience, which is one and indivisible.”<sup>14</sup> None of us, including public officials, leads parallel moral lives that can be compartmentalized into

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<sup>10</sup> Congregation for the Doctrine of the Faith, Doctrinal Note on some questions regarding the Participation of Catholics in Political Life, (November 24, 2002), *available at* [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20021124\\_politica\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html).

<sup>11</sup> *Id.* at #4.

<sup>12</sup> *Id.*; *see also* John Paul II, *Evangelium Vitae*, 24 ORIGINS 689, 715 #73 (“In the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it, or to ‘take part in a propaganda campaign in favor of such a law, or vote for it.’”); John Finnis, *Restricting Legalised Abortion is Not Intrinsically Unjust*, in COOPERATION, COMPLICITY & CONSCIENCE: PROBLEMS IN HEALTHCARE, SCIENCE, LAW AND PUBLIC POLICY (Helen Watt, ed., 2005), at 209-45 (discussing the meaning of *Evangelium Vitae* #73 and the complexity of determining when a law in fact is an intrinsically unjust law permitting abortion). Finnis argues that a provision is “permissive” of abortion and intrinsically unjust “only if it has the legal meaning and effect of *reducing* the state’s legal protection of the unborn.” *Id.* at 209; *see also id.* at 233 (consideration of the legal and legislative context and circumstances that give rise to a law, as well as a legislator’s intent in voting for the law, are relevant to assessing whether the law’s meaning and effect are “permissive” as that term is used in *Evangelium Vitae* #73).

<sup>13</sup> Doctrinal Note on Participation of Catholics in Political Life, *supra* note 10 at #4.

<sup>14</sup> *Id.* at #6.



separate spheres, one spiritual and one secular. Instead, “[l]iving and acting in conformity with one’s own conscience on questions of politics is . . . the way in which Christians offer their concrete contributions so that, through political life, society will become more just and more consistent with the dignity of the human person.”<sup>15</sup>

These principles drawn from the CDF’s Doctrinal Note laid the foundation for the communion controversy that was sparked by statements made by a small number of bishops during the year before the 2004 presidential election. That controversy forms a crucial element of the context behind the discussion of the relationship between Roberts’ faith and his role as a Supreme Court justice. The bishops whose statements led to the communion controversy asserted that Catholic politicians who espouse pro-choice political positions should be excluded from receiving communion.<sup>16</sup> As moral theologian Fr. Bryan Massingale explains, “the actions taken by these bishops were interpreted as just a shade less serious than public excommunication.” Moreover, the bishops “were widely viewed as implying that it would be immoral for a Catholic to support or vote for a pro-choice candidate.”<sup>17</sup> Bishop Michael Sheridan of

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<sup>15</sup> Doctrinal Note on Participation of Catholics in Political Life, *supra* note 10 at #6. *See also* Gregory A. Kalscheur, S.J., *American Catholics and the State*, 191 AMERICA (August 2, 2004), pp. 15-18 (arguing that a public official’s commitment to moral integrity demands that his or her participation in public life should not be separated from his or her conscientious judgments regarding issues of justice, human dignity, and the common good).

<sup>16</sup> *Cf.* Benedict XVI, *Sacramentum Caritatis*, *supra* note 2, at #83 (“[E]ucharistic consistency [is] a quality that our lives are objectively called to embody. Worship pleasing to God can never be a purely private matter, without consequences for our relationships with others: it demands a public witness to our faith.”).

<sup>17</sup> Bryan Massingale, *Catholic Participation in Political Life*, 35 ORIGINS 469, 471 (Dec. 22, 2005).

Colorado Springs, in fact, explicitly made just that assertion.<sup>18</sup> While the American bishops as a whole ultimately did not adopt this position,<sup>19</sup> the communion controversy received widespread media coverage and generated significant anger and dismay among Catholic public officials, especially Catholic Democrats with public positions supporting abortion rights.

The debate over John Roberts' Catholicism in the summer of 2005 erupted in the midst of this lingering anger among some Catholic public officials that was provoked by the 2004 communion controversy.<sup>20</sup> In the wake of the exchange between Roberts and Durbin, commentators began openly to ask the following question: would the bishops treat the Catholic John Roberts in the same way in which they had treated the Catholic John Kerry? Former New York Governor Mario Cuomo, for example, wondered "how those bishops who tormented [John] Kerry would react if [Judge] Roberts said that his religious views would

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<sup>18</sup> Bishop Michael Sheridan, *The Duties of Catholic Politicians and Voters*, 34 ORIGINS 5, 6 (May 20, 2004) ("There must be no confusion in these matters. Any Catholic politicians who advocate for abortion, for illicit stem-cell research or for any form of euthanasia ipso facto place themselves outside full communion with the church and so jeopardize their salvation. Any Catholics who vote for candidates who stand for abortion, illicit stem-cell research or euthanasia suffer the same fateful consequences. It is for this reason that these Catholics, whether candidates for office or those who would vote for them, may not receive holy communion until they have recanted their positions and been reconciled with God and the church in the sacrament of penance.").

<sup>19</sup> Statement of the U.S. Bishops, *Catholics in Political Life*, 34 ORIGINS 98, 99 (July 1, 2004) ("The question has been raised as to whether the denial of holy communion to some Catholics in political life is necessary because of their public support for abortion on demand. Given the wide range of circumstances involved in arriving at a prudential judgment on a matter of this seriousness, we recognize that such decisions rest with the individual bishop in accord with the established canonical and pastoral principles. Bishops can legitimately make different judgments on the most prudent course of pastoral action.").

<sup>20</sup> Richard Garnett, *Kmiec, Cuomo, and Russert*, posted at [http://www.mirrorofjustice.com/mirrorofjustice/2005/08/kmiec\\_cuomo\\_and.html](http://www.mirrorofjustice.com/mirrorofjustice/2005/08/kmiec_cuomo_and.html) (August 7, 2005) (describing the "lingering anger" of many Catholics over the communion controversy as the "back story" to the debate about Roberts' Catholicism). See also Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1067 n.66 (1990) (discussing a similar communion controversy that erupted in 1989).

not affect his rulings on abortion cases.”<sup>21</sup> Would not consistency demand that Judge Roberts be subjected to the same sort of criticism that had been directed at Senator Kerry?

An op-ed piece by Michael McGough in the Los Angeles Times made a similar assertion: “[F]or those bishops who *do* take a hard line against pro-choice legislators, there is no excuse in theology or logic for holding back from sanctioning Catholic judges – such as Supreme Court Justice Anthony M. Kennedy – who vote to affirm or apply *Roe vs. Wade*.”<sup>22</sup> Amy Sullivan on the blog Beliefnet made the same argument, claiming that “an honest look at the Church’s statements on the special responsibilities of Catholic public officials to uphold Church teaching on abortion must conclude that they do not exempt officials in judicial positions.”<sup>23</sup>

During the Senate confirmation hearings held in September 2005 and January 2006, Democratic senators pressed both John Roberts and Samuel Alito to speak about the relationship between their faith and their judicial role. In response to questioning from Senator Diane Feinstein, Roberts made the following statement: “[M]y faith and my religious beliefs do not play a role in

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<sup>21</sup> E.J. Dionne, Jr., *Why It’s Right to Ask About Roberts’s Faith*, WASH. POST, August 2, 2005, at A13 (quoting a phone conversation with Cuomo).

<sup>22</sup> Michael McGough, *Catholic Judges and a Higher Authority*, L.A. TIMES, August 1, 2005, at B11.

<sup>23</sup> Amy Sullivan, *The Catholic Choice*, posted at [http://www.beliefnet.com/story/178/story\\_17836.html](http://www.beliefnet.com/story/178/story_17836.html).

judging. When it comes to judging, I look to the law books and always have. I don't look to the Bible or any other religious source."<sup>24</sup>

Five months later, during the Alito confirmation hearings, Senator Durbin asked Judge Alito what role his personal, religious, or moral beliefs would play in his judicial decision making process. Alito's answer echoed the answer given by John Roberts at his own confirmation hearings: "My obligation as a judge is to interpret and apply the Constitution and the laws of the United States and not my personal religious beliefs or any special moral belief that I have. And there is nothing about my religious beliefs that interferes with my doing that. I have a particular role to play as a judge. That does not involve imposing any religious views that I have or moral views that I have on the rest of the country." Senator Durbin was quick to praise this answer, noting that Alito's response acknowledged that Alito was describing "the same challenge many of us face on this side of the table with decisions we face."<sup>25</sup>

Senator Durbin's reaction to Judge Alito's answer is worth pausing over. Catholic public officials like Senator Durbin, Senator Kerry, and Governor Cuomo have often responded to ecclesial criticism of their voting records by

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<sup>24</sup> Confirmation Hearing on the Nomination of John Roberts to be Chief Justice of the United States Supreme Court Before the S. Comm. On the Judiciary (Sept. 13, 2005), available at 2005 WL 2214702 (F.D.C.H.).

<sup>25</sup> Confirmation Hearing on the Nomination of Samuel Alito to be Associate Justice of the United States Supreme Court Before the S. Comm. On the Judiciary (Jan. 11, 2006), available at 2006 WL 53273 (F.D.C.H.). Similar concerns and questions arose during the confirmation hearings of Justices William Brennan and Antonin Scalia. See Michael R. Merz, *Conscience of a Catholic Judge*, 29 U. DAYTON L. REV. 305, 314-15 (2004) (discussing the Brennan and Scalia hearings); *id.* at 315 ("There is something fundamentally wrong with a process, supposedly in support of a pluralist society, which requires a candidate for judge to abjure any influence in his or her work from deeply held moral beliefs just because those beliefs are consonant with the judge's religion."); see also Levinson, *supra* note 20, at 1062-65 (discussing the Brennan, Scalia, and Kennedy confirmation hearings).

drawing a line between their personal religious and moral views and their public policy positions. They contend that, while as Catholics they may be personally opposed to abortion, they cannot impose their personal religious views on the rest of the country. The bishops' frustration with this sort of separation of personal conscience from political policy was clearly one of the factors driving the communion controversy that followed the promulgation of the CDF Doctrinal Note.<sup>26</sup> Senator Durbin seemed to suggest that he detected the same sort of separation of personal conscience and public decision making in Judge Alito and Judge Robert's explanations of the relationship between their personal faith and their public role as judges. In fact, Senator Durbin's comment on Judge Alito's answer implicitly suggests the following provocative question: if the bishops are so upset with Senator Kerry and Senator Durbin for separating their personal views as Catholics from their public policy positions, why doesn't

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<sup>26</sup> See, e.g., Archbishop William J. Levada, *Reflections on Catholics in Political Life and the Reception of Holy Communion*, 34 ORIGINS 101, 101-02 (July 1, 2004) ("Over the years since the 1973 *Roe v. Wade* Supreme Court decision, the frustration of many Catholics, bishops among them, about Catholic politicians who not only ignore church teaching on abortion but actively espouse a contrary position has continued to grow."). Bryan Massingale describes two frustrations on the part of the bishops. First, the bishops are frustrated by what they see as inconsistency between the expressed personal opposition to abortion by many Catholic politicians and their failure to engage in public advocacy against abortion. The second source of frustration is the assumption of many Catholic politicians (and members of the wider public) that opposition to abortion amounts to the imposition of a sectarian moral code on a pluralistic society. The bishops maintain that the church's opposition to abortion is based on the natural moral law – "a common moral truth that spans religious affiliations" – that can be recognized and embraced "by all reasonable people of good will." For the bishops, it is difficult to understand why a politician would hesitate to act on a conviction that "is an obvious conclusion of common morality," rather than a sectarian position rooted in revelation. See Massingale, *supra* note 17, at 472; see also Laurie Goodstein, *Guiliani's Views on Abortion Upset Catholic Leaders*, N.Y. TIMES, June 25, 2007, at A14 ("[C]hurch leaders say they are frustrated by prominent Catholic politicians like Mr. Giuliani who argue that while they are personally opposed to abortion, they do not want to impose their beliefs on others."); *id.* ("Archbishop John J. Meyers of Newark said ... 'To violate human life is always and everywhere wrong. In fact, we don't think it's a matter of church teaching, but a matter of the way God made the world, and it applies to everyone.'").

consistency demand that the bishops criticize Catholic judges for separating their Catholic beliefs from their public decision making as judges?

In the context of the lingering anger over the communion controversy, this question of consistency really seems to have been the subtext underlying much of the debate about John Roberts' Catholicism in the summer of 2005. In order to answer Senator Durbin's implicit question, however, we must keep in mind a critical distinction that is too often overlooked in contemporary debates about the role of faith in public life, namely, the distinction between the role of the judge in our constitutional system and the very different role of a legislator or a policy maker. Senator Durbin is wrong to equate the moral challenges faced by legislators and judges in their decision making. He is wrong because the different roles held by legislators and judges mean that legislators and judges are usually making very different sorts of decisions.<sup>27</sup>

Senator Durbin is not alone in sometimes seeming to blur the distinctions between the different roles played by judges and legislators. After Justice O'Connor announced her retirement from the Court, Bishop William S. Skylstadt, president of the U.S. Conference of Catholic Bishops, wrote a letter to President Bush outlining the qualities that he hoped the President "would

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<sup>27</sup> See, e.g., *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("[T]he judiciary does not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations in areas that neither affect fundamental rights nor proceed along suspect lines."). Cf. Robert K. Vischer, *Professional Identity and the Contours of Prudence*, 4 UNIV. OF ST. THOMAS L.J. 46 (2007) (arguing that the different professional roles played by lawyers and judges make the exercise of prudential judgment look different in the context of lawyers' decision making versus that of a lawyer); *id.* at 51 ("[L]awyers and judges can recognize and articulate the ends of prudential judgment only by recognizing and articulating the ends of their specific roles.").

contemplate as [he] decide[d] on the appointment of her successor.” Bishop Skylstadt urged the President to consider candidates with the following characteristics:

[Q]ualified jurists who, pre-eminently, support the protection of human life from conception to natural death, especially of those who are unborn, disabled, or terminally ill. I would ask you to consider jurists who are cognizant of the rights of minorities, immigrants and those in need; respect the role of religion and of religious institutions in our society and protections afforded them by the First Amendment; recognize the value of parental choice in education; and favor restraining and ending the use of the death penalty.<sup>28</sup>

While one can sympathize with Bishop Skylstad’s hope that the President will nominate jurists who support policies that comport with the basic moral principles of Catholic social teaching, it is quite another matter to assume that *all* of those moral principles are rooted in the U.S. Constitution and other sources of law in a way that makes them appropriate sources for judicial – in contrast to legislative – decision making. As Professor Theresa Collett notes, “the good of communal self-governance” demands that “deep respect for the positive law should govern the vast majority of a judge’s decisions.”<sup>29</sup>

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<sup>28</sup> USCCB Head Writes President Bush on Supreme Court Vacancy, available at <http://www.usccb.org/comm/archives/2005/05-155.shtml>.

<sup>29</sup> Collett, *Religion in Judicial Decisionmaking*, *supra* note 4, at 1299. Accordingly, when religious wisdom “conflicts with the political choices embodied in the positive law,” judicial reliance on religious wisdom should be restricted. *Id.*; cf. Ori Lev, *Personal Morality and Judicial Decision-Making in the Death Penalty Context*, 11 J.L. & RELIGION, 637, 641 (1994-1995) (“[I]f the law recognized a judge’s morality as a legitimate source of law, a judge ... could legitimately invoke such morality as the basis of decision. Given the ‘thoroughgoing positivism’ of the American legal tradition, however, reliance on one’s personal morality is an illegitimate basis for decision.”); Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 J.L. & RELIGION 33, 36 (1989) (natural law “cannot actually displace clear positive law without also displacing the idea of democratic self-government under a written constitution (a value itself supported by natural law).”).

This sort of judicial respect for positive law – a respect grounded in a moral commitment to the good of democratic self-government – is consistent with a proper understanding of the differentiated relationship that exists between law and morality. As Professor Robert George explains,

[T]he question of how much legislative authority a judge has to translate the natural law into positive law by nullifying positive law which he believes to be unjust is a question of positive law, not natural law. Different political systems reasonably differ (both in theory and practice) as to how much legislative authority they confer upon judges.<sup>30</sup>

This “positivism” of judicial respect for positive law in light of the limited nature of the judge’s role in the American constitutional system does not, however, mean that judges have no responsibility to evaluate the positive law in light of fundamental moral principles as they carry out their judicial duties:

According to natural law theorists, judges are under the same obligations of truth telling that the rest of us are under. If the [positive] law [that the

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<sup>30</sup> Letter from Robert George to Sanford Levinson, *quoted* in Levinson, *supra* note 20, at 1076 n.85; *see also* Eduardo M. Peñalver, *Restoring the Right Constitution?* 116 YALE L.J. 101, 133 (2007) (“[T]here is no intrinsic connection between the natural law’s potent language for talking about the moral quality of the law and unrestrained judicial power. In other words, an affirmation of natural law theory is every bit as consistent with judicial minimalism...as it is with ...judicial supremacy.”); Justice Antonin Scalia, Remarks at Pew Forum Panel Discussion: A Call for Reckoning: Religion and the Death Penalty (Jan. 25, 2002), *transcript available at* <http://pewforum.org/deathpenalty/resources/transcript3.php3> (“[M]y difficulty with *Roe v. Wade* is a legal rather than a moral one. I do not believe – and no one believed for 200 years – that the Constitution contains a right to abortion. And if a state were to permit abortion on demand, I would and could in good conscience vote against an attempt to invalidate that law, for the same reason that I vote against invalidation of laws that contradict *Roe v. Wade*; namely, simply because the Constitution gives the federal government and, hence, me no power over the matter.”). The extent to which nontextual moral norms might, in fact, properly be understood as judicially enforceable principles of constitutional law has been a contested question since the early days of U.S. constitutional history. *See* Gregory A. Kalscheur, S.J., *Christian Scripture and American Scripture: An Instructive Analogy?* 21 J.L. & RELIGION 101, 133 (2005-2006) (discussing *Calder v. Bull*, 3 U.S. 386 (1798), and the exchange between Justice Chase and Justice Iredell regarding the judicial enforceability of non-textual principles of natural justice); *see also* Gregory Kalscheur, S.J., *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 SO. CAL. INTERDISCIPLINARY L.J.1, 15-20 & 15 n.71 (2006) (even in the absence of explicit constitutional limitations, respect for human dignity places some matters beyond the legitimate power of a limited, constitutional government); Levinson, *supra* note 20, at 1074-81 (discussing the relevance of morality to constitutional analysis); *cf.* notes 37-41 *infra* and accompanying text.



judge is called on to interpret and apply] is in conflict with the natural law, the judge may not lie about it. If his duty is to give judgment according to the positive law, then he must either (i) do so or (ii) recuse himself. If he can give judgment according to immoral positive law without rendering himself ... complicit in its immorality, and without giving scandal, then he may licitly do so (though he may also licitly recuse himself). If not, then he must recuse himself.<sup>31</sup>

Thus, the distinct roles played by judges and legislators within the American constitutional system call judges and legislators to make different sorts of decisions with respect to the law. The role of the legislator is to craft laws that will best protect that limited portion of the common good that is committed to the care of the state acting through law.<sup>32</sup> Let us assume that a legislator states sincerely that he or she is persuaded that abortion is a grave moral evil because it is an attack on the inviolable dignity of human life. That conscientious conclusion is not simply a matter of personal morality with no public import; it is a moral conviction that ought to have consequences for how that legislator thinks about public policy. Because abortion ends a human life, it is not simply a private matter. Instead, as an attack on the fundamental human right to life, abortion is contrary to justice and the common good.<sup>33</sup> If a legislator desires to live a life of integrity and moral coherence, his or her participation in politics should not be cut off from the conscientious judgment he or she has made about

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<sup>31</sup> Letter from Robert George, *supra* note 30 (discussing the “positivism” of Justice Scalia).

<sup>32</sup> For a discussion of the proper limits on the use of the law to promote the common good, see Kalscheur, *Moral Limits on Morals Legislation*, *supra* note 30, at 13-30. *See also* Congregation for the Doctrine of the Faith, *Donum Vitae (Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation)*, available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19870222\\_respect-for-human-life\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html), Part III (“In no sphere of life can the civil law ... dictate norms concerning things which are outside its competence.”).

<sup>33</sup> *See* Kalscheur, *Moral Limits on Morals Legislation*, *supra* note 30, at 27.

the morality of abortion. Because the legislator's role is to craft positive law that will best promote the common good, a legislator who holds the conscientious conviction that abortion is a grave moral evil *for that reason has a duty* to promote justice and the common good by striving to craft laws that will accomplish a reduction in the incidence of abortion.

*How* a policy maker should go about striving to reduce the incidence of abortion in contemporary American culture, under existing constitutional constraints, and in the face of significant social disagreement with regard to the underlying moral issue, is an exceptionally complicated question. Good lawmaking is never simply a matter of directly transposing moral conclusions into rules of civil law. Drawing on jurisprudential principles rooted in the thought of Thomas Aquinas, the Jesuit theologian John Courtney Murray explained that moral law and civil law are essentially related, but necessarily differentiated:

Both the science and art of jurisprudence and also the statesman's craft rest on the differential character of law and morals, of legal experience and religious or moral experience, of political unity and religious unity. *The jurist's work proceeds from the axiom that the principles of religion or morality cannot be transgressed, but neither can they be immediately translated into civilized human law.* There is an intermediate step, the inspection of circumstances and the consideration of ... the public advantage to be found, or not found, in transforming a moral or religious principle into a compulsory rule for general enforcement upon society. <sup>34</sup>

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<sup>34</sup> John Courtney Murray, S.J., *Leo XIII and Pius XII: Government and the Order of Religion*, in RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM 59-60 (Leon Hooper, S.J., ed., 1993) (emphasis added); see CDF, *Donum Vitae* III, *supra* note 32, Part III ("The intervention of the public authority must be inspired by the rational principles which regulate the relationships between civil law and moral law. [The civil law] must sometimes tolerate, for the sake of public order, things which it cannot forbid without a greater evil resulting."); R. Mary Hayden Lemmons, *Juridical Prudence and the Toleration of Evil: Aquinas and John Paul II*, 4 U. ST. THOMAS L.J. 24, 28-29 (2006) ("A certain degree of harm must be

Thus, the complex question of how best to promote fundamental moral values through civil law so as to most effectively promote the common good in the particular social context facing the legislator is always a contingent question that calls for the legislator to exercise the virtue of prudence.<sup>35</sup>

While the role of the legislator is to strive to embody in positive law those policies that will (in the conscientious, prudential judgment of the legislator) best promote the common good, the role of the judge with regard to the common good is significantly different. “[T]he choices involved in making law differ from

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tolerated, otherwise the burden on those not yet virtuous would be so unbearable that they ‘would break out into yet greater evils.’”) (quoting Thomas Aquinas, *SUMMA THEOLOGICA* I-II, q. 96 a.2, reply to objection 2); Gregory A. Kalscheur, S.J., *John Paul II, John Courtney Murray, and the Relationship between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, 1 *J. CATHOLIC SOCIAL THOUGHT* 231, 253-58, 263-64, 266-67 (2004); M. Cathleen Kaveny, *The Limits of Ordinary Virtue: The Limits of the Criminal Law in Implementing Evangelium Vitae*, in *CHOOSING LIFE: A DIALOGUE ON EVANGELIUM VITAE* 132-49 (K. Wildes & A. Mitchell, eds., 1997); see also James L. Heft, S.M., *Religion and Politics: The Catholic Contribution*, 32 *U. DAYTON L. REV.* 29, 42 (2006) (“[I]t is necessary for all Catholics, and for Catholic legislators, to agree with the Church’s moral teaching on abortion. But I also find it not so clear when it comes to how best to translate that moral teaching into civil law in a society where only one-fourth of the population is Catholic, and when Catholics are not all of one mind on how to deal with *Roe v. Wade*. . . . [T]he bishops should be more helpful to legislators by acknowledging the complexities of the decisions they need to make on legislative matters related to moral issues.”); John Langan, S.J., *Observations on Abortion and Politics*, 191 *AMERICA*, 9, 11 (Oct. 25, 2004) (“[T]he enactment of any prohibition of abortion is not simply the enunciation of a moral truth; it is a political and legal act which is to be carried out in an arena where there are many conflicting points of view and interests and where there is widespread hostility to the pro-life position.”).

<sup>35</sup> See Kalscheur, *American Catholics and the State*, *supra* note 15, at 17. See also Lemmons, *supra* note 34, at 29-33 (discussing the principles of juridical prudence that inform conscientious legislating); Kalscheur, *Relationship between Civil Law and Moral Law*, *supra* note 34, at 255-57; John Langan, S.J., *Homily for Fr. Robert Drinan’s Funeral*, 36 *ORIGINS* 556, 557 (February 15, 2007) (“The shape of legislation can be a matter for prudential disagreement, not an issue of faithfulness.”); Anthony Fisher, O.P., *The Duties of a Catholic Politician with Respect to Bio-Lawmaking*, 20 *NOTRE DAME J.L., ETHICS & PUBLIC POL’Y* 89, 118-19 (2006) (discussing the virtue of political prudence); *id.* at 121 (“We must . . . be loathe to judge our confreres who differ from us on prudential matters in the battle against abortion and euthanasia); Massingale, *supra* note 17, at 470 (“Prudence . . . seeks not the absolute best, but the best that can be attained for now.”); Archbishop John Quinn, *The Virtue of Prudence and the Spectrum of Issues Affecting Human Dignity*, 34 *ORIGINS* 334, 335 (Nov. 4, 2004) (“It is fitting to bring into our Catholic consciousness the tradition of prudence in the church’s teaching, with its probing question, What will make the situation better rather than worse for the protection of life in the full array of its claims? To lose sight of the full spectrum of issues which affect human dignity runs the grave risk of playing into the hands of those who are eager to allege that the pro-life stance is a sectarian issue.”). For a helpful discussion of the nuanced, contextual operation of the virtue of prudence, see Vischer, *supra* note 27, at 50-52.

those involved in deciding law.”<sup>36</sup> The role of the judge in our constitutional system is *not* primarily or directly to make public policy. Instead, the primary role of the judge is to use the tools of legal analysis to interpret the Constitution and laws and to apply those laws as they exist in the context of deciding individual cases.

It is true that legal interpretation and judicial decision making often properly involves more than the mechanical deduction of conclusions from determinate legal norms. Legal norms can be indeterminate in a way that demands judicial specification in concrete cases.<sup>37</sup> Yet there is still a critical difference between the role of legislators and that of judges. In exercising their role, legislators have the freedom to make whatever policy choices are not prohibited by the constitution that empowers them to act. Judges, in contrast, do not have unbounded policy making power.<sup>38</sup> The legislator promotes the

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<sup>36</sup> Lemmons, *supra* note 34, at 30 (Because the choices involved are different, “legislative and judicial cases must be distinguished and treated separately.”).

<sup>37</sup> See, e.g., MICHAEL J. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS* 92-93 (2007). Specifying an indeterminate legal norm “is not a process of deduction or simple application of a general rule to a specific case; instead it is an exercise of good judgment.” See also Gregory A. Kalscheur, S.J., *Christian Scripture and American Scripture: An Instructive Analogy?* 21 J. L. & REL. 101, 135 (2005-2006) (discussing Perry’s approach to constitutional interpretation). To the extent that such a power to exercise good judgment involves “a creative decision ... a kind of legislative judgment”, that power “arguably belongs in the hands of the politically dependent, because electorally accountable, policymaking officials of the legislative and/or executive branches of government.” Perry, *supra*, at 93 (quoting Richard A. Posner, *What am I? A Potted Plant?*, *New Republic* 23, 24 (Sept. 28, 1987)); see also *id.* at 107 (endorsing a “system of judicial penultimacy” with respect to constitutionally entrenched indeterminate human rights norms as offering “the best of both worlds: an opportunity for a deliberative judicial consideration of a difficult and perhaps divisive human rights issue and an opportunity for electorally accountable officials to respond in a politically effective way”).

<sup>38</sup> See, e.g., Richard B. Saphire, *Religion and Recusal*, 81 MARQUETTE L. REV. 351, 351 (1998) (“Judges, of course, wield political power.... But judges exercise a special kind of power. Generally speaking, the judicial function is not one of lawmaking, but of law application. It is the judge’s task to determine what the law is and to apply it in the cases before him or her.”). Legislators (and constitution makers) create the texts that articulate the norms which provide the “textual anchor” and discretion-limiting “tether” for legitimate judicial decision making:

common good by striving to enact just legal norms. The judge promotes the common good by interpreting, applying, and specifying legislatively enacted or constitutionally entrenched legal norms in a way that upholds the fundamental component of the common good that is known as the rule of law.<sup>39</sup> While the judge's convictions regarding morality and justice will properly play a role in the development of the law,<sup>40</sup> the role of the judge in our constitutional system places constraints on the judge's freedom simply to reshape the law to conform to his or her moral convictions about what the law ought to be in order to promote justice and the common good.<sup>41</sup>

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Without a textual anchor for their decisions, judges would have to rely on some theory of natural right, or some allegedly shared standard of the ends and the limits of government, to strike down invasive legislation. But an appeal to normative ideals that lack any mooring in the written law... would in societies like ours be suspect, because it would represent so profound an aberration from majoritarian principles.... A text, moreover, is necessary not only to make judges' decisions efficacious: it also helps to tether their discretion. I would be the last to cabin judges' power to keep the law vital, to ensure that it remains abreast of the progress in man's intellect and sensibilities. Unbounded freedom, however, is another matter. One can imagine a system of governance that accorded judges almost unlimited discretion, but it would be one reminiscent of the rule by Platonic Guardians that Judge Learned Hand so feared.

Perry, *supra* note 37, at 206 n. 13 (quoting William J. Brennan, Jr., *Why Have a Bill of Rights?*, 9 OXFORD J. LEGAL STUDIES 425, 432 (1989)); *see also id.* at 139 (“The search must be for a [judicial] function ... which differs from the legislative and executive functions; ... which can be so exercised as to be acceptable in a society that generally shares Judge [Learned] Hand's satisfaction in a ‘sense of common venture’; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.” (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 24 (1962))).

<sup>39</sup> Cf. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270-73 (1980) (discussing the relationship between the rule of law and the requirements of justice and the common good).

<sup>40</sup> *See Vischer, supra* note 27, at 63 (“[T]he law's indeterminacy may allow a judge's rightly formed conception of justice to have a positive impact on the law's development. ‘The judge's sense of right and wrong,’ after all, ‘shapes, to some extent, the direction in which the law evolves.’”) (quoting Dulles, *supra* note 7, at 288).

<sup>41</sup> *See Dulles, supra* note 7, at 287-88. *See also Vischer, supra* note 27, at 61 (“[F]or a judge, extralegal moral norms should be kept at the margins when evaluating the performance of her professional role.... [B]y looking beyond her own moral convictions (which is a starkly different proposition than pretending her own moral convictions do not exist), she can acknowledge the moral significance of judging without subverting the rule of law.”); William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American*

Consider this example drawn from the work of Judge John Noonan of the U.S. Court of Appeals for the Ninth Circuit. In 1995, Judge Noonan authored an opinion rejecting a constitutional challenge to the state of Washington's prohibition of physician-assisted suicide. One of the plaintiffs challenging the statute was a group called Compassion in Dying. Judge Noonan's opinion closed with these words: "Compassion cannot be the compass of a federal judge. That compass is the Constitution of the United States."<sup>42</sup> Similarly, while a judge appropriately brings his or her convictions regarding justice and morality to the work of deciding cases,<sup>43</sup> Catholic moral doctrine cannot displace the Constitution and laws of the United States as the legal compass guiding the judge faced with the task of deciding what a particular provision of the law means in the context of a specific case. There is no official Church teaching that defines what the U.S. Constitution means. Indeed, such a question is beyond the competence of the Church's teaching office.<sup>44</sup> Judge Noonan did not uphold the

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*Catholic Judge*, 24 YALE L. & POL'Y REV. 347, 355-58 (2006) (discussing how the role and duty of the judge differs from that of the legislator or executive).

<sup>42</sup> *Compassion in Dying v. Washington*, 49 F.3d 586, 594 (9<sup>th</sup> Cir. 1995)

<sup>43</sup> See notes 40-41, *supra*, and accompanying text.

<sup>44</sup> Cardinal Levada, formerly archbishop of San Francisco and now the head of the Vatican Congregation on the Doctrine of the Faith, has asserted that the "Supreme Court's judgment about the application of the Constitution should ... be guided by the principles of the moral law." Levada, *supra* note 26, at 104. It is not clear what Cardinal Levada means here, but we need not conclude that he is arguing that the Supreme Court has the power to make decisions that comply with the principles of the moral law even when there is no basis in proper constitutional analysis for so concluding. Cardinal Levada notes, for example, that Catholic moral teaching recognizes "that those who make and *interpret* the law are not always able to deal with ideal or perfect solutions." *Id.* (emphasis added). Thus, the Cardinal would seem to acknowledge that proper interpretation of the Constitution may sometimes preclude a decision that reflects the "ideal or perfect" embodiment of the moral law. As Professor Douglas W. Kmiec, explains, "[t]here is no 'Catholic way' of interpreting the U.S. Constitution. The tools of constitutional interpretation are its text, history, and structure." While Catholics with familiarity with the natural law tradition "will more readily grasp that our constitutional history includes the self-evident truths of creation, equality, and unalienable rights referenced in the Declaration of Independence," these are not exclusively Catholic truths. Douglas W.

Washington statute prohibiting physician-assisted suicide because it conformed to the Church's teaching that physician-assisted suicide is a moral evil.<sup>45</sup> Instead, Judge Noonan upheld the statute because nothing in the Constitution prohibited the state from enacting such a statute.

What should a morally conscientious judge do, however, when the law as it exists is truly unjust and the action that the law requires of the judge in a given case is truly in conflict with the conscientious convictions of the judge? This question brings us back to the exchange between Senator Durbin and John Roberts: What would you do, the Catholic senator asked the Catholic judge, if the law required you to issue a ruling that the Catholic Church considered immoral? Roberts replied that, in such a conflict between his Catholic moral beliefs and the ruling required by the law, he would probably have to recuse himself. In this sort of situation, the conscientious judge might indeed have to remove himself in order to avoid cooperating in a morally evil action. In other words, the judge will have to decide whether the action required of him by the law in a particular case culpably contributes to the morally objectionable act of another person.

This, then, becomes the crucial question: Does the desire to avoid cooperation in moral evil make the conscientious Catholic unfit for judicial

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Kmiec, *The Catholic Judge and Roe v. Wade* (Nov. 3, 2005), available at [http://www.beliefnet.com/story/178/story\\_17832\\_1.html](http://www.beliefnet.com/story/178/story_17832_1.html).

<sup>45</sup> See John Paul II, *Evangelium Vitae*, *supra* note 12, at 712 #66 ("To concur with the intention of another person to commit suicide and to help in carrying it out through so-called 'assisted suicide' means to cooperate in and at times to be the actual perpetrator of an injustice which can never be excused even if it is requested.").

service in a constitutional system that will inevitably bring before the Catholic judge cases that implicate a host of issues as to which the Church offers moral teaching? I think the answer to that question is no; there is no good reason why a conscientious Catholic should not be able to serve as a judge, and a judge's Catholicism should not raise any special suspicions about his or her ability faithfully to carry out the judicial role in the vast majority of cases that will come before the judge. In order to understand why this is so, we need to take a very short course in a fairly complicated corner of moral theology.

## II.

In everyday life, all of us in various ways find ourselves cooperating in the morally objectionable actions of other people. A person might, for example, live in a state that provides public funding for embryonic stem cell research. Assume that the person accepts the Church's teaching that the destruction of embryonic human life is a moral evil. Taxes collected from that person will help facilitate the destruction of human embryos. Because the tax money facilitates the research, the person is cooperating in what he has concluded is a morally evil act. At the same time, however, it does not seem reasonable to conclude that the taxpayer himself is committing a morally evil act simply by paying his taxes as the law requires.<sup>46</sup> In order to help people navigate these sorts of situations

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<sup>46</sup> Cf. GERMAIN GRISEZ, 3 THE WAY OF THE LORD JESUS: DIFFICULT MORAL QUESTIONS 871 (1997) (“[A]ltogether avoiding cooperation ... is virtually impossible and sometimes inconsistent with doing one's duty.... [T]hough taxpayers materially cooperate with nuclear deterrence and other evils, paying taxes is morally obligatory.”).



without themselves committing wrongful actions, moral theologians have developed an analytical framework that is called the principle of cooperation.<sup>47</sup>

Before going any further down this road, I want to offer a disclaimer: the principle of cooperation is not a bright-line rule that provides us with many easy answers. In fact, an English Jesuit theologian once wrote in a textbook that, of all the principles in moral theology, the principle of cooperation is the most difficult to apply.<sup>48</sup> In light of that difficulty, I want to acknowledge from the outset that the conclusions drawn from application of the principle of cooperation to particular cases can often be open to dispute. Indeed, the principle of cooperation “is not designed automatically to generate undebatable answers to what are undeniably complex questions.”<sup>49</sup> But the principle of cooperation is the analytical tool that the Catholic tradition gives us to help us try to sort out which conflicts between conscience and the law ought to lead conscientious judges to refrain from deciding particular cases. With that in mind, all we can do is make our best effort to use the tool the tradition makes available.

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<sup>47</sup> For a recent discussion of the principle of cooperation in the judicial context, see Edward A. Hartnett, *Catholic Judges and Cooperation in Sin*, 4 UNIV. OF ST. THOMAS L.J. 221 (2006).

<sup>48</sup> See Thomas R. Kopfensteiner, *The Man With a Ladder*, 191 AMERICA (Nov. 1, 2004), at 9 (referring to Henry Davis, S.J., author of *Moral and Pastoral Theology* (1958)).

<sup>49</sup> M. Cathleen Kaveny, *Appropriation of Evil: Cooperation's Mirror Image*, 61 THEOLOGICAL STUDIES 280, 284 (2000); see also BERNARD HÄRING, 2 THE LAW OF CHRIST 500-01 (1963) (“It is far from our mind to suggest final solutions. In fact, it is not at all possible to arrive at blanket solutions in every conceivable case if one takes into account every aspect of the problem. Our first task is to illustrate the universal principles which are always valid. The conclusions we arrive at individual instances, however, may in their concrete application under different sets of circumstances involve new principles.”). Häring explains that looking at particular cases is a useful way to illustrate general axioms, but the cases “do not furnish a facile and final solution. Every new situation must draw from the spirit of the Gospel its own proper solution based on openness to the concrete realities.” *Id.* at 481; *cf. id.* at 483 (“[I]t may be difficult, and perhaps well-nigh impossible, to determine with finality in purely legal fashion what actually is and what is not scandal in concrete circumstances.”).

The general definition of cooperation with evil is “concurrence with another person in [an] act” that is morally wrong.<sup>50</sup> Professor M. Cathleen Kaveny, who teaches both law and moral theology at Notre Dame, notes that the principle of cooperation addresses the following sorts of questions: “How do we decide when the contribution that our action will make to another’s wrongdoing is too great, or the connection between their action and ours is too close? When does making such a contribution [adversely affect our moral character], and when it is it simply the regrettable, inevitable consequence of living in a fallen world that is also ineluctably social?”<sup>51</sup> Bishop Anthony Fisher, articulates the questions addressed by the principle of cooperation in this way: “How close to taking part in the act itself can one person get to the wrongful act of another, without becoming a culpable accessory?”<sup>52</sup>

The analytical framework that has developed around the principle of cooperation begins to answer these questions by making a crucial distinction between formal cooperation and material cooperation.<sup>53</sup> Pope John Paul II, in the encyclical *Evangelium Vitae*, stated that everyone is “under a grave obligation of conscience not to cooperate formally” in evil actions.<sup>54</sup> Formal cooperation is defined as cooperating in a morally wrongful act while “sharing in the immoral

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<sup>50</sup> Kaveny, *supra* note 49, at 282 (quoting textbook by Henry Davis, S.J.).

<sup>51</sup> *Id.* at 283.

<sup>52</sup> *Id.* (quoting Anthony Fisher, *Cooperation in Evil*, 44 CATHOLIC MEDICAL QUARTERLY 15 (1994)).

<sup>53</sup> *Id.* at 284.

<sup>54</sup> John Paul II, *Evangelium Vitae*, *supra* note 12, at 715 #74 (discussing the general principles concerning cooperation in the evil actions of another).

intention of the person committing [the act].”<sup>55</sup> Put simply, formal cooperation in evil is always wrong.<sup>56</sup>

Material cooperation, in contrast, can sometimes be justified for a proportionate reason.<sup>57</sup> A person engages in material cooperation when he or she does something that facilitates or creates the conditions for a wrongful act, but the person does not share in the intention of the actor who actually engages in the wrongful conduct. An actor has a proportionate reason to engage in material cooperation when the actor reaches the conclusion that the reasons for acting “are sufficiently strong that doing the act would be reasonable despite the more or less strong reasons to forgo” the act of cooperation.<sup>58</sup> Reaching this judgment about the comparative strength of the arguments for and against engaging in the act of cooperation is the work of prudence,<sup>59</sup> and the permissibility of material cooperation has to be assessed on a case-by-case basis. Moral theologians have developed elaborate sets of categories that attempt to

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<sup>55</sup> *Id.*

<sup>56</sup> Kopfensteiner, *supra* note 48, at 10.

<sup>57</sup> As Cardinal Levada explains,

the complex moral analysis of the liceity of material cooperation in evil can be helpful as guidance for Catholics in political life. When formal cooperation (evil as intended) is excluded, some degree of material cooperation may be justified, according to the analysis of an individual situation: Is the person’s right intention sufficiently known? Will scandal be avoided? Does the cooperation aim at lessening the bad effects of the cooperation?

Levada, *supra* note 26, at 104.

<sup>58</sup> GRISEZ, *supra* note 46, at 884.

<sup>59</sup> *Id.* at 885; *see id.* at 884-89 (discussing how the conscientious actor judges the relative strength of the arguments regarding proportionate reason).

capture the various factors that help to determine whether a person has a proportionate reason to engage in an act of material cooperation.<sup>60</sup>

For example, the tradition makes an important distinction between remote material cooperation and proximate material cooperation. As an act of material cooperation gets closer to the wrongful act in time, space, or causal connection, the harder it is to justify.<sup>61</sup> Whether or not a proportionate reason justifying the act exists may in turn depend on additional factors. For example, how grave a loss would be suffered by the cooperator if she declines to engage in the act of cooperation? What is the magnitude of the evil that will result from the wrongful act intended by the other person? How certain is it that the act of cooperation really will be misused by the other person? How probable is it that refusal to engage in the act of cooperation would prevent the wrongdoing by the other person? And, finally, how much risk is there that the act of cooperation will cause scandal to others?<sup>62</sup> Professor Kaveny notes that “causing scandal” in this context has to be understood in its specialized theological sense: does

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<sup>60</sup> The summary of the analytical framework that follows is drawn from Professor Kaveny’s 2000 article in *Theological Studies*. See Kaveny, *supra* note 49, at 284-86. See also M. Cathleen Kaveny, *Prophecy and Casuistry: Abortion, Torture and Moral Discourse*, 51 VILL. L. REV. 499, 526-530 (2006) (describing the “extremely nuanced distinctions” that characterize the analytical matrix governing the issue of cooperation with evil).

<sup>61</sup> See, e.g., HÄRING, *supra* note 49, at 499 (“These reasons [which justify material cooperation] must be the more valid and weighty ... *the more proximate our contribution or cooperation* in the sinful action of others ...”). Grisez rejects this distinction. He argues that the closeness of a material cooperator’s involvement in the wrongdoing of another is not morally significant of itself. The closeness of involvement does, however, “correlate[ ] more or less well with many of the factors affecting the strength of reasons not to cooperate.” Highly proximate cooperation may, for example, make it more difficult for the cooperator to witness to the truth and may create a higher risk of scandal to others. “Still closeness of involvement is morally insignificant unless correlated with some factor that affects the strength of the reason not to cooperate.” GRIZEZ, *supra* note 46, at 890.

<sup>62</sup> See HÄRING, *supra* note 49, at 499 (describing the reasons that justify material cooperation and “which may even suggest and advise it, if they do not go so far as to oblige it”)

performing a particular action increase the possibility that people who witness the action will engage in morally objectionable activity themselves? Will the act of cooperation have the effect of leading other people into sin?<sup>63</sup>

This framework for analysis was refined over time through the process of comparing and contrasting particular cases that is known as casuistry. Among the classic cases discussed by the casuists was a situation particularly relevant to the role of the judge: can a Catholic judge preside over a divorce case? The traditional answer is yes; for grave and proportionate reasons, such judges may act in accordance with the traditional principles of material cooperation.<sup>64</sup> The casuists argued that it generally promotes the common good for a conscientious judge to be part of the legal system, because of the justice that we hope the work of the judge can bring to the institution of the law as a whole.<sup>65</sup> The judge, therefore, has a proportionate reason for being faithful to the demands of the law in this case.

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<sup>63</sup> See Kaveny, *supra* note 49, at 285-86 & n. 14.

<sup>64</sup> See John Paul II, *Marriage Indissolubility and the Roles of Judges and Lawyers (Address to the Roman Rota)*, 31 ORIGINS 597, 601 (“For grave and proportionate motives [judges] may act in accord with the traditional principles of material cooperation.”); see also Hartnett, *supra* note 47, at 246-48 (discussing judicial cooperation in the context of divorce); BERNARD HÄRING, 2 THE LAW OF CHRIST 511 (1963) (“Should [the judge] in no way be able to prevent the action [i.e., granting a divorce to a couple whose marriage is valid before God], despite all his sincere efforts, we may look upon the granting of the divorce as material cooperation which is permitted for a grave reason; for loss of office would indeed be a grave consideration.”); FRANCIS J. CONNELL, MORALS IN POLITICS AND PROFESSIONS: A GUIDE FOR CATHOLICS IN PUBLIC LIFE 31 (1946) (noting that a “sufficiently weighty” reason for a judge to preside over a divorce case “would seem to be present if the judge were in danger of losing his office in the event that he refused to accept a divorce suit, or even if serious antagonism and loss of prestige ensued”).

<sup>65</sup> See James F. Keenan, S.J., *Cooperation, Principle of*, in THE NEW DICTIONARY OF CATHOLIC SOCIAL THOUGHT (Judith A. Dwyer, ed. 1994), at 234 (A judge may preside over a divorce case, “not solely or even because of [his] financial needs ... but rather because of the hope that [his] presence in the institution will lead to less wrongdoing in the future.”).

This analytical framework also applies to the individual Catholic in his or her role as voter. As noted above, prior to the 2004 election, the bishop of Colorado Springs, Michael Sheridan, suggested that any Catholic who votes in favor of a pro-choice candidate, illicit embryonic stem cell research, or euthanasia, “may not receive holy communion until they have recanted their positions and been reconciled with God and the church in the sacrament of penance.”<sup>66</sup> Shortly thereafter, the current pope, then-Cardinal Joseph Ratzinger, in his role as head of the Vatican Congregation on the Doctrine of the Faith, sent a memorandum regarding worthiness to receive communion to Cardinal Theodore McCarrick, then-archbishop of Washington, who was chair of the U.S. bishops’ task force on Catholic politicians. Cardinal Ratzinger’s memorandum concluded with a discussion of the principle of cooperation as it applies to a voter:

A Catholic would be guilty of formal cooperation in evil, and so unworthy to present himself for holy Communion, if he were to deliberately vote for a candidate *precisely because of* the candidate’s permissive stand on abortion and/or euthanasia. When a Catholic does not share a candidate’s stand in favor of abortion and/or euthanasia, but votes for that candidate for other reasons, it is considered remote, material cooperation, which can be permitted in the presence of proportionate reasons.<sup>67</sup>

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<sup>66</sup> Bishop Michael Sheridan, *The Duties of Catholic Politicians and Voters*, 34 ORIGINS 5, 6 (May 20, 2004); see notes 16-19 *supra* and accompanying text (discussing the 2004 communion controversy).

<sup>67</sup> Cardinals Joseph Ratzinger and Theodore McCarrick, *Vatican, U.S. Bishops: On Catholics in Political Life*, 34 ORIGINS 133, 134 (July 29, 2004) (emphasis added); cf. Benedict XVI, *Sacramentum Caritatis*, *supra* note 2, at #83 (noting that the lives of all the baptized, including those involved in political life, “are objectively called to embody” a quality characterized as “eucharistic consistency”).

Cardinal Ratzinger, however, did not explain how the voter was to assess whether or not proportionate reasons existed that would justify a vote for a candidate who takes a permissive stand on abortion or euthanasia. The undersecretary of the Congregation on the Doctrine of the Faith, Fr. Augustine DiNoia noted that “defining what constitutes ‘proportionate’ reasons is extremely difficult,”<sup>68</sup> and he suggested that the following conclusion could be drawn from Cardinal Ratzinger’s memorandum: “[A] person might come to be in the state of mortal sin and therefore unworthy to receive Communion *if they voted precisely with the moral object of extending abortion* or the provision of abortion, but that would be the *only* case where that would happen.”<sup>69</sup>

In the wake of Cardinal Ratzinger’s memorandum, those few American bishops who spoke to the issue of “proportionate reasons” took a range of positions on whether or not such reasons might exist in the context of the presidential election.<sup>70</sup> Archbishop Myers of Newark, New Jersey, and Archbishop Burke of St. Louis, both argued that abortion was such a grave and widespread moral evil that no proportionate reason existed that would justify voting for a pro-choice candidate.<sup>71</sup> Then-Archbishop Levada of San Francisco, however, suggested that proportionate reasons might exist that could justify

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<sup>68</sup> Heft, *Abortion and Proportionate Reasons*, *supra* note 1, at 271.

<sup>69</sup> *Id.* (emphasis added).

<sup>70</sup> *Id.* at 264.

<sup>71</sup> *Id.* at 264-65; *cf. id.* at 271 (“Even if they are right about the moral gravity of [abortion and embryonic stem-cell research], and I believe that they are, it does not necessarily follow that voting for a pro-life candidate, for such reasons, makes the most sense.”).

such a vote: “if a Catholic voted for a candidate despite his or her pro-choice stance, it would not necessarily be sinful.”<sup>72</sup>

The remarks of Fr. DiNoia and Archbishop Levada suggest that “issues which require a person to employ proportionate reasoning on the issue of voting are matters of prudence on which people of good will might well differ.”<sup>73</sup>

Indeed, the bishops of Virginia stated that voters should approach the question of “proportionate reasons” in this way:

*Assessing proportionality is a matter for the individual conscience.* However, a conscience must be correctly formed before it can be properly followed. In other words, we must seek the “mind of Christ” in the voting judgments we make, just as we must do when contemplating any other moral decisions in our lives. We urge each of you to inform your own consciences thoroughly, weighing all issues from the perspective of church teaching and of their implications for our brothers and sisters in the human family. In doing so, it is important to recognize just how serious abortion is when considering whether there are proportionate (i.e. very serious) reasons for making other important issues the decisive factor in your voting choices.<sup>74</sup>

The gravity of the moral evil of abortion clearly is a crucial consideration in assessing whether it is morally appropriate to vote for a particular candidate.

Yet a voter should also consider seriously the degree to which a particular candidate is likely to be able to diminish the actual incidence of abortion, especially in light of the current constitutional status of the right to make the

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<sup>72</sup> *Id.* at 265; *see also id.* (“Several bishops, including Bishop John Kinney of St. Cloud, Minnesota, warned against denying a pro-choice candidate communion, and added that ‘no human is capable of judging someone else’s relationship with God.’”).

<sup>73</sup> *Id.* at 271.

<sup>74</sup> Bishops of Virginia (Bishop Paul Loverde and Bishop Francis DiLorenzo), *The Voter’s Responsibility*, 35 ORIGINS 370, 371 (November 10, 2005) (emphasis added); *see also* note 9 *supra* (discussing the Catholic understanding of conscience); *cf.* Quinn, *supra* note 35, at 335 (“[N]or is it prudent for bishops to tell the Catholic people which among several candidates they should vote for... The voting booth, like the confessional, admits only one person at a time. There each of us stands before our conscience. But not alone. We hope that the charioteer of virtues, prudence, stands with us.”).



abortion decision. Moreover, grave as the issue of abortion unarguably is, it is not the only very serious moral issue that demands the attention of the conscientious voter. The “promotion of the common good in all its forms” is a value that is “not negotiable”<sup>75</sup> as Catholics engage in the careful discernment that is required to make conscientious decisions regarding their participation in public life.<sup>76</sup>

### III.

Now we are in a position to apply the principle of cooperation to the issues of abortion and the death penalty that might confront Catholic judges working in the contemporary American legal system. What sorts of issues might

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<sup>75</sup> Benedict XVI, *Sacramentum Caritatis*, *supra* note 2, at #83. The Holy Father identified the following fundamental values as “not negotiable” in making public policy decisions: “respect for human life, its defense from conception to natural death, the family built upon marriage between a man and a woman, the freedom to educate one’s children, and the promotion of the common good in all its forms.” *Id.* Political decision making should be “inspired by values grounded in human nature,” and political decisions should be based on “a properly formed conscience.” *Id.* While these fundamental moral *values* are “not negotiable,” translating moral values into positive *law* in a pluralistic society is a complex endeavor. Indeed, deciding how best to promote fundamental moral values through civil legislation that will truly function as good law promoting the common good in all its forms under the concrete conditions of a given society demands the exercise of political prudence. The necessary process of conscience formation is appropriately attentive to the *limits* of what it might be *possible* for the law to accomplish under existing social, political, and constitutional conditions. *See* Lemmons, *supra* note 34, at 30-31; *see also* notes 34 & 35 *supra* and accompanying text. As John Paul II explained in *Evangelium Vitae*,

when it is not possible to overturn or completely abrogate a pro-abortion law, an elected official, whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at limiting the harm done by such a law and at lessening its negative consequences at the level of general opinion and public morality. This does not in fact represent an illicit cooperation with an unjust law, but rather a legitimate and proper attempt to limit its evil aspects.

*Evangelium Vitae*, *supra* note 12, at #73; *see also* Finnis, *supra* note 12, at 109, 233 (discussing the meaning of *Evangelium Vitae* #73).

<sup>76</sup> *See* Heft, *Abortion and Proportionate Reasons*, *supra* note 1, at 273 (the “global common good is precisely what all thoughtful Catholics and especially US Catholics have an obligation to promote”); *see also id.*, at 273 n. 36 (drawing a distinction between “a collective deed, such as the war in Iraq, which is an action of the US government and therefore directly and collectively implicates all US citizens” and “abortion which the government permits but does not perform”).

create a conflict between the judge's oath to faithfully and impartially apply the Constitution and laws of the United States<sup>77</sup> and that same judge's moral obligation to be faithful to the demands of his or her religiously informed conscience? This question will be considered in the context of the following three cases:

1. Does a Supreme Court justice culpably cooperate with evil by voting to uphold the core principles of *Roe v. Wade* when presented with an opportunity to overrule *Roe*? This was the situation faced by Justice Anthony Kennedy in the Court's 1992 decision in *Planned Parenthood v. Casey*, and this is the sort of situation that seemed to drive most of the discussion around John Roberts' Catholicism during the debates that took place during the summer of 2005.

2. Does a state court trial judge culpably cooperate with evil if he issues an order authorizing a minor to obtain an abortion without involving her parents in a judicial bypass proceeding seeking to waive parental notification or consent requirements?

3. Does a judge who wants to be faithful to the Church's teaching about the death penalty culpably cooperate with evil by participating in the judicial

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<sup>77</sup> See 28 U.S.C. § 453 ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, \_\_\_\_\_, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_ under the Constitution and laws of the United States. So help me God.'"); see also Merz, *supra* note 25, at 309-10 ("A judge is bound by his or her oath of office to enforce the law in every case...The duty of the judge to follow the law is ... a moral obligation, for the oath of office imposes a strong moral duty."); cf. GRISEZ, *supra* note 46, at 882 ("[I]f something must be done to fulfill a responsibility flowing from a vocational commitment, there is a stronger reason to accept the bad side effects in doing it than if one could forgo the activity without slighting any such responsibility.").

proceedings associated with capital punishment? Justice Harry Blackmun declared toward the end of his time on the Supreme Court that he could no longer “tinker with the machinery of death.”<sup>78</sup> Must a Catholic judge take the same stance? Can a Catholic judge cooperate with the “machinery of death”?

### Case #1

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>79</sup> the Court opened up some new space for abortion regulation, while reaffirming the core holding of *Roe v. Wade*.<sup>80</sup> The constitutional law with respect to abortion after *Casey* has three central components: 1) prior to viability, women have a constitutionally protected liberty interest to make the decision to have an abortion. 2) Pre-viability regulation of abortion is unconstitutional if it places an undue burden on the woman’s right to choose to have an abortion. 3) After viability, the state is free to prohibit abortion, except where appropriate medical judgment deems the abortion to be necessary to preserve the life or health of the mother.<sup>81</sup>

Four members of the Court – Justices White, Scalia, and Thomas, along with Chief Justice Rehnquist – were prepared in *Casey* to overrule *Roe*. Two other members of the Court, Justices Blackmun and Stevens, wanted to retain the

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<sup>78</sup> *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (“From this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.”)

<sup>79</sup> 505 U.S. 833 (1992).

<sup>80</sup> 410 U.S. 113 (1973).

<sup>81</sup> 505 U.S. at 878-79.

broad protection for the freedom to make the abortion decision that was drawn from *Roe*. The outcome of the case was, therefore, determined by the remaining three justices – O’Connor, Kennedy, and Souter – whose joint opinion now provides the controlling constitutional doctrine on abortion.

The joint opinion makes two points that are relevant to the topic of this Essay. It first develops an argument that attempts to explain how constitutional protection for the woman’s decision to terminate her pregnancy is supported by a line of precedents interpreting the due process clause of the Fourteenth Amendment.<sup>82</sup> This leads the authors of the joint opinion to conclude that, no matter what any of them might personally believe about the morality of abortion, the Constitution of the United States places limits on the government’s ability to regulate abortion.<sup>83</sup>

The joint opinion then makes this interesting statement: even though Pennsylvania made weighty arguments that *Roe* should be overruled, “the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.”<sup>84</sup> In plain English, Justices O’Connor, Souter, and Kennedy are saying that, even if we think *Roe* was wrongly decided, it is a

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<sup>82</sup> 505 U.S. at 846-53

<sup>83</sup> 505 U.S. at 850 (“Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.”).

<sup>84</sup> 505 U.S. at 853.

precedent that people have come to rely on in planning their lives,<sup>85</sup> and if we overrule that precedent now we will do damage to both the rule of law and to the legitimacy of the Court as an institution.<sup>86</sup>

There are good grounds to conclude that the arguments made by the joint opinion should be rejected as a matter of sound constitutional analysis.<sup>87</sup> At the same time, however, it is wrong to conclude that a judge whose informed conscience tells him that abortion is a moral evil culpably cooperates in evil by taking the sort of position articulated in the joint opinion. A judge could reasonably join the joint opinion because he sincerely (even if erroneously) concludes that the Constitution, when properly interpreted, does provide protection for the right to make the abortion decision. Alternatively, a judge could join the joint opinion because he sincerely (even if erroneously) concludes that respect for the rule of law prevents him from voting to overrule the precedent established in *Roe*.

To conclude as a matter of constitutional law that a woman's right to make the abortion decision must be protected *does* facilitate abortion by creating the conditions that allow abortions to take place. If *Roe* were overruled, states would be free to prohibit more abortions, and some states would choose to do so. The judicial act of voting to maintain the central holding of *Roe* does, therefore, raise the issue of cooperation with evil. But the judge reaching such a conclusion

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<sup>85</sup> 505 U.S. at 855-56.

<sup>86</sup> 505 U.S. at 869.

<sup>87</sup> *See, e.g.*, 505 U.S. at 951-66 (Rehnquist, C.J.) and 505 U.S. at 979-1002 (Scalia, J.) (criticizing the analysis of the joint opinion).

for the reasons just described does not necessarily share in the intent of a woman who chooses to have an abortion. Accordingly, voting to uphold *Roe* does not constitute illicit formal cooperation.<sup>88</sup> Moreover, voting to uphold *Roe* does not *require* anyone to engage in any immoral act; it does no more than say that the law *cannot prohibit* a particular sort of immoral act. As Justice Scalia has said, “a judge . . . bears no moral guilt for the laws society has failed to enact.”<sup>89</sup>

Deciding not to overrule *Roe* might, then, accurately be characterized as a form of nonculpable remote, material cooperation, which can be justified by the judge’s duty to be faithful to his oath to uphold the law as he understands it.<sup>90</sup>

Professor Douglas Kmiec explains that the Church does not instruct judges to make the law better if doing so would require them to act outside the proper bounds of their role as a judge. Thus, Catholic justices do not have a

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<sup>88</sup> See Hartnett, *supra* note 47, at 249 (“[F]inding a law [prohibiting abortion] unconstitutional does not necessarily constitute formal cooperation in the evil that the law sought to avoid. More generally, a judicial decision that determines the legal allocation of power is not necessarily formal cooperation in the sins of those to whom the law allocates power.”).

<sup>89</sup> Justice Antonin Scalia, Remarks at Pew Forum Panel Discussion: A Call for Reckoning: Religion and the Death Penalty (Jan. 25, 2002), *transcript available at* <http://pewforum.org/deathpenalty/resources/transcript3.php3>.

<sup>90</sup> See Hartnett, *supra* note 47, at 255 (“[I]t is an important and good thing for judges to decide cases, including constitutional cases, according to law.”). *But cf.* Bruce Ledewitz, *An Essay Concerning Judicial Resignation and Non-Cooperation in the Presence of Evil*, 27 DUQ. L. REV. 1, 9 (1988) (“[F]or the judge who sees abortion and execution as murder, there is no persuasive excuse for cooperation.”). Professor Ledewitz argues that a pro-life judge should resign rather than enforcing the law in a way that provides direct or indirect aid to abortion. “The very fact that abortion is legal offers tremendous legitimation to abortion.... Thus, it may not be possible to remain a judge at all in a society that allows, and encourages, abortion.” As Professor Hartnett notes, however, the Catholic judge’s refusal to participate in any abortion cases is unlikely to prevent the underlying wrong of abortion; “different judges will be brought in to decide the cases in accordance with the law.... Worse, if Catholic judges refuse to hear abortion cases because of the risk of material cooperation, their legal perspective on such issues will be lost to the courts.” Hartnett, *supra* note 47, at 256. See also Lois G. Forer, *The Role of Conscience in Judicial Decision-Making*, in *THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW & RELIGION* (John Witte, Jr. and Frank S. Alexander, eds.) 301 n. 35 (1988) (“I have refused to sit on cases in which the death penalty has been demanded. The result has been the preservation of my own moral integrity at the price of submitting defendants to a court composed of ‘death qualified’ judges.”).

specific Catholic duty to use their power on the bench to restrain abortion.<sup>91</sup> The judge's duty is to use the tools of constitutional interpretation to ascertain how the Constitution deals with the question of abortion. Professor Kmiec concludes that, "in ruling on . . . matters [of constitutional law], a judge does not become morally complicit in the underlying act [that the law might allow] or share i[n the] intent" of the actor engaged in constitutionally permitted, but wrongful, conduct.<sup>92</sup>

The same sort of cooperation analysis applies to the decisions of lower court judges who, prior to the Supreme Court's recent decision in *Gonzalez v. Carhart*,<sup>93</sup> concluded that controlling precedent required them to declare

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<sup>91</sup> Douglas W. Kmiec, *The Catholic Judge and Roe v. Wade* (Nov. 3, 2005), available at [http://www.beliefnet.com/story/178/story\\_17832\\_1.html](http://www.beliefnet.com/story/178/story_17832_1.html). *But cf.* Paulsen, *supra* note 29, at 37 ("[J]udges should never apply *Roe* or other pro-abortion law against conscience. The moral imperative is to resist *Roe* through every legitimate means . . . . Where it is not possible for the judge honestly to avoid the rule of *Roe*, the judge should refuse to enforce *Roe* in any event, not through the subversion of the rule of law, but by challenging the Supreme Court's clearly erroneous holding, by recusing himself in the particular case, or, if push comes to shove, by resigning.").

<sup>92</sup> Douglas W. Kmiec, *Catholic Judges, the U.S. Constitution and Natural Law* (Interview with Catholic Online, Aug. 30, 2005) (copy on file with the author). Bernard Häring seems to suggest a somewhat different analysis:

A judge may frequently be confronted by the predicament of pronouncing "justice" or "right" according to an *unjust law*. If by some legal provision he is permitted to withdraw from the case or is in some way able to avoid making the decision, he cannot be excused from the guilt of formal cooperation if he, nevertheless, decides the case. Should this withdrawal be impossible, then we must hold that his act goes no further than his pronouncement that the law applies in this particular instance, a decision which can be viewed as only material cooperation.

HÄRING, *supra* note 49, at 510. The judge's intent in pronouncing and applying the law, however, does not vary according to whether or not withdrawal is an option for the judge. If the nature of the judge's intent is the key to making the distinction between formal cooperation and material cooperation, the possibility of recusal in a given case shouldn't convert a good intent into an intent that coincides with that of the wrongdoer. It seems that Professor Kmiec has better captured the key distinction. If the judge in issuing his decision intends that the underlying moral wrong be done, he is guilty of formal cooperation. If he intends only to say what the law is, and the law allows a moral wrong to occur, the judicial act is better characterized as material cooperation, which might be justified by proportionate reasons.

<sup>93</sup> 127 S. Ct. 1610 (2007) (upholding the federal Partial-Birth Abortion Ban Act of 2003 against a facial challenge to its constitutionality), *rev'g* *Planned Parenthood Federation of America v. Ashcroft*, 435 F.3d 1163 (9<sup>th</sup> Cir. 2006) *and* *Carhart v. Ashcroft*, 413 F.3d 791 (8<sup>th</sup> Cir. 2005).

unconstitutional the federal Partial-Birth Abortion Ban Act of 2003.<sup>94</sup> A judge whose ruling strikes down a law that would restrict some abortions because that judge reaches the legal conclusion that the law is unconstitutional is not morally complicit in the abortions that would have been prohibited by the unconstitutional law.<sup>95</sup> The late Judge Richard Conway Casey of the U.S. District Court for the Southern District of New York faced this situation in the case of *National Abortion Federation v. Ashcroft*.<sup>96</sup>

The plaintiffs in that case challenged the Federal Partial-Birth Abortion Ban, which bans the procedure the Act defines as partial-birth abortion, unless the procedure is necessary to save the life of the mother.<sup>97</sup> Congress passed this law after the Supreme Court in 2000 struck down a similar Nebraska law in the case of *Stenberg v. Carhart*.<sup>98</sup> The *Stenberg* Court held that the Nebraska law was unconstitutional, in part because it did not provide an exception allowing the procedure when it was necessary, in appropriate medical judgment, to preserve the health of the mother. As a lower court judge, Judge Casey was bound to

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<sup>94</sup> 18 U.S.C. §1531 (2004 ed., Supp. IV).

<sup>95</sup> I am assuming here that the judge sincerely believes that the conclusion he or she has reached is the proper legal conclusion as a matter of constitutional law.

<sup>96</sup> 330 F. Supp.2d 436 (S.D.N.Y. 2004), *aff'd sub nom.* National Abortion Fed. v. Gonzales, 437 F.3d 437 (2d Cir. 2006), *vacated*, 2007 WL 1454322 (2d Cir. May 16, 2007) (noting that the plaintiffs conceded that *Gonzales v. Carhart* precluded relief on their facial challenge to the federal ban).

<sup>97</sup> “Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.” 18 U.S.C. §1531(a). *See also* 18 U.S.C. §1531(b)(1) (defining the term “partial-birth abortion”).

<sup>98</sup> 530 U.S. 914 (2000).



apply the Supreme Court's decision in *Stenberg* as the relevant precedent governing his analysis of the constitutionality of the new federal statute.

Judge Casey ultimately concluded that there was no way to read *Stenberg* that would allow him to conclude that the federal statute was constitutional. He closed his opinion enjoining enforcement of the statute with these words:

While ... lower courts may disagree with the Supreme Court's constitutional decisions, that does not free them from their constitutional duty to obey the Supreme Court's rulings. . . . The Supreme Court in *Stenberg* informed us that this gruesome procedure may be outlawed only if there exists a medical consensus that there is no circumstance in which any woman could potentially benefit from it. A division of medical opinion exists, [and] such a division means that the Constitution requires a health exception. *Stenberg* obligates this Court . . . to defer to the expressed medical opinion of a significant body of medical authority. ... *Stenberg* remains the law of the land. Therefore, the Act is unconstitutional.<sup>99</sup>

Such a ruling did not make Judge Casey morally culpable for the law's inability to prohibit a practice which his opinion describes in excruciating detail, and which his factual findings explicitly characterize as "a gruesome, brutal, barbaric, and uncivilized medical procedure."<sup>100</sup> Judge Casey's action is best characterized as remote, material cooperation that is justified by the proportionate reason of the judge's duty to be faithful to his oath to uphold the law, which here includes an obligation to obey what the judge understood to be a

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<sup>99</sup> 330 F. Supp.2d at 492-93. The Supreme Court in *Gonzalez v. Carhart* noted that "*Stenberg* has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty." 127 S. Ct. at 1638. The *Carhart* Court, however, rejected that reading of *Stenberg*: "The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives." *Id.*

<sup>100</sup> 330 F. Supp.2d at 479; *see also* Hartnett, *supra* note 47, at 268 (noting that Judge Casey's opinion helped to reduce the risk of scandal "by letting others know that cooperation does not imply approval").

controlling Supreme Court precedent.<sup>101</sup> As Professor Hartnett explains, “it would appear that in most abortion cases, a judge’s material cooperation is permissible, particularly if a judge takes steps to avoid scandal by letting others know that his or her legal decision does not imply approval of direct abortion.”<sup>102</sup>

### Case #2

While a judge’s participation in most cases involving the issue of abortion can be understood as permissible material cooperation, the case of a judge called upon to preside over a judicial bypass proceeding where a minor is seeking authorization for an abortion without her parents’ involvement is different. More than forty states have statutes requiring that a parent be involved in their minor daughter’s decision to seek an abortion.<sup>103</sup> Some states require parental consent, others require parental notification. In order for a parental consent

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<sup>101</sup> For an argument that neither the demands of a hierarchical judicial system nor fidelity to the rule of law requires a lower court judge to enforce a “controlling” precedent that the judge concludes is lawless and immoral, see Paulsen, *supra* note 29, at 82-88 (urging lower court judges to “underrule” *Roe* by refusing to be bound by a lawless precedent). “So long as the lower court may still be reversed by the higher court, there is no interference with either the ‘supremacy’ of the Supreme Court or the idea of the rule of law.” *Id.* at 84; *see also id.* at 85 (“[W]hile it may be thought a breach of decorum for an inferior court to repudiate a precedent of a superior tribunal, such conduct is not constitutionally insubordinate, and is surely not categorically improper.”). Professor Paulsen explains that “[t]he conscientious lower court judge must not become an accomplice in [the] dirty work” of enforcing an *ultra vires* interpretation of the Constitution like *Roe*. “It is possible, perhaps even likely, that a judge following this course will be reversed (and chastised) by a reviewing court, and directed to enter an order based on the unjust and unjustifiable precedent.... But when the source of the judge’s ... dilemma is lawless judicial precedent rather than validly adopted positive law, the judge need not in the first instance follow the quasi-traditional path of criticism, recusal, and resignation, but should first undertake to underrule the lawless precedent.” *Id.* at 88. *But cf.* *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (“Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”).

<sup>102</sup> Hartnett, *supra* note 47, at 257.

<sup>103</sup> *See Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961, 966 n.1 (2006); Lauren Treadwell, Note, *Informal Closing of the Bypass: Minors’ Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Recusals*, 58 HASTINGS L.J. 869, 873 (2007).

statute to withstand constitutional scrutiny, the statute must allow a minor who does not wish to involve her parents in the decision to petition a judge to authorize the abortion without parental consent.<sup>104</sup> The Wisconsin parental consent statute, for example, provides that, except in cases involving a medical emergency or other specified extenuating circumstances, a physician may not perform an abortion for a minor *unless* 1) the physician has received the informed written consent of one of the minor's parents *or* 2) a court has granted a petition waiving the parental consent requirement.<sup>105</sup> The statute further provides that the court "shall grant the petition" if the court after a confidential hearing finds either "that the minor is mature and well-informed enough to make the abortion decision on her own," or "that the performance . . . of the abortion is in the minor's best interest."<sup>106</sup>

A judge who believes that abortion is a moral evil and is called upon to preside over one of these parental involvement bypass hearings may indeed face a conflict between conscience and an act that he is required by the law to perform. Unlike the judges called upon to interpret the Constitution in Case #1, the judge in Case #2 may be required by the law to issue an order authorizing a particular minor to obtain an abortion without parental consent. Would the

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<sup>104</sup> See *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997). While the Supreme Court has yet to decide whether a judicial bypass option is constitutionally required in a statute that does not mandate parental consent, most parental notification statutes do include a judicial bypass option. See Treadwell, *supra* note 103, at 873 & n. 27.

<sup>105</sup> WIS. STAT. ANN. § 48.375(4).

<sup>106</sup> WIS. STAT. ANN. § 48.375(7)(c).

judge be morally complicit in the minor's abortion if he or she issued such an order?<sup>107</sup>

Keep in mind that there are two grounds on which a judge might issue such an order. If the judge issued an order authorizing the minor to obtain an abortion without the involvement of her parents on the ground that the abortion was in the best interest of the minor, the judge's act is almost certainly best characterized as illicit formal cooperation. "[A] determination that an abortion is in someone's best interest constitutes a decision that an abortion should take place."<sup>108</sup> Thus, when issuing such an order, the judge presumably intends that minor should proceed to obtain the abortion. To issue an order with this intent constitutes formal cooperation in the ensuing wrongful act of abortion.<sup>109</sup>

In contrast, a judge who issues an order authorizing an abortion without the involvement of the minor's parents on the ground that the minor is mature enough to make the decision on her own may be involved in material, rather

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<sup>107</sup> The principle of cooperation also structures the analytical framework that applies to the question of whether or not an attorney who believes that abortion is a grave moral evil can licitly represent a minor in a parental involvement bypass hearing. See Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 FORDHAM L. REV. 1339, 1354-59, 1359 (1997-1998) (concluding that a lawyer who believes abortion to be a grave moral evil cannot "argu[e] for a court order permitting a minor to consent to the performance of an abortion"); see also *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1137 (7<sup>th</sup> Cir. 1983) ("we would certainly expect an attorney who [had strongly held religious or moral beliefs about the wrongfulness of abortion] not to accept a court appointment"); Theresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635 (1997) (criticizing an opinion of the Tennessee Board of Professional Responsibility suggesting that attorneys have an ethical duty to accept appointment to represent minors seeking abortions, even if such representation violates the attorney's conscientious belief that abortion is a grave moral evil); Robert J. Muise, Note, *Professional Responsibility for Catholic Lawyers: The Judgment of Conscience*, 71 NOTRE DAME L. REV. 771, 786-94 (1996) (discussing the principle of cooperation as an analytical tool that provides guidance to Catholic lawyers making ethical decisions regarding the practice of law).

<sup>108</sup> Hartnett, *supra* note 47, at 250.

<sup>109</sup> *Id.* at 250-51.

than formal, cooperation in the abortion obtained by the minor. The judge might intend only to apply the law faithfully; he or she does not necessarily issue the order with the intent that minor obtain the abortion. Is the material cooperation involved in issuing such an order permissible?

The material cooperation here is best characterized as proximate, not remote; the judge's action here is much closer to an actual act of wrongdoing than is true in Case #1. At the same time, it is still possible to separate the judge's act of applying the law from the minor's independent act of deciding whether to have the abortion or not. If she decides to have the abortion, she would be misusing the freedom that the judge's obligation to comply with the law gives her. Still, in light of the temporal proximity that the order authorizing the abortion would have to the actual act of wrongdoing, the gravity of the wrongdoing that is being explicitly authorized by the judge, and the critical role played by the judge in making it possible for the minor to obtain the abortion,<sup>110</sup> it may be difficult to conclude that the judge's act of material cooperation can be justified by a proportionate reason. Under this analysis, judges who hold the conscientious conviction that abortion is a grave moral evil have strong reasons

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<sup>110</sup> Cf. Larry Cunningham, *Can a Catholic Lawyer Represent a Minor Seeking a Judicial Bypass for an Abortion? A Moral and Canon Law Analysis*, 44 J. CATHOLIC L. STUD. 379, 395 (2005) (“[A] lawyer who represents a particular minor in a judicial bypass proceeding would be a necessary cooperater to a specific abortion. He is directly involved in the death of a particular fetus.”); *id.* at 397 (suggesting that it might be possible to argue that the lawyer's assistance was not “necessary” to the abortion: “What is it that he is ‘assisting’? It is not the physical act of the death of the fetus, but instead the minor's decision or ability to have the physical act performed. His assistance is a step or two removed from the act, and is legal, not physical, in nature. ... A lawyer's assistance is not with the actual, physical procedure; it is with providing the opportunity for the physical act to occur.”).

to recuse themselves from judicial bypass proceedings in order to avoid culpable material cooperation in evil.<sup>111</sup>

Judges have in fact begun to opt out of these abortion petition cases on moral grounds. In September of 2005, the *New York Times* reported that a Tennessee judge refused to hear a minor's abortion petition case.<sup>112</sup> The judge also announced that he would recuse himself from all such cases in the future. Judge John R. McCarroll of the Shelby County Circuit Court explained that he recused himself, because he believed that "[t]aking the life of an innocent human being is contrary to the moral order," and he therefore "could not in good conscience make a finding that would allow the minor to proceed with the abortion."<sup>113</sup> In effect, Judge McCarroll was saying that his conscience made it impossible for him to follow the law that applied to the case. Four of the other nine judges on the Shelby County court have made similar recusal decisions, and the *Times* report noted that judges in Alabama and Pennsylvania have also said they will not hear such cases.<sup>114</sup>

In response to Judge McCarroll's announcement, twelve experts on judicial ethics wrote to the Tennessee Supreme Court describing his action as

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<sup>111</sup> See Hartnett, *supra* note 47, at 257.

<sup>112</sup> Adam Liptak, *On Moral Grounds, Some Judges Are Opting Out of Abortion Cases*, N.Y. TIMES, Sept. 4, 2005, at A21.

<sup>113</sup> *Id.*

<sup>114</sup> Liptak, *supra* note 112, at 21; see also Treadwell, *supra* note 103, at 870 (noting that there have been judicial recusals from bypass proceedings in Tennessee, Minnesota, Pennsylvania, and Alabama). In 1993, an Ohio juvenile court judge declared that he would recuse himself from future judicial bypass proceedings after the county court of appeals urged him to stop hearing such cases on the ground that his repeated rejections of minors' requests to waive Ohio's parental notification requirement were the result of prejudice with respect to the abortion issue. See Catherine Candisky, *Twynford to Quit Ruling on Abortion Requests*, COLUMBUS DISPATCH, April 23, 1993, at 2C.

“lawless.” The letter explained that “unwillingness to follow the law is not a legitimate ground for recusal.” The law professors’ letter asserted that Judge McCarroll’s only options were to enforce the law or resign from the bench. One of the professors, Susan Koniak, said that “judges are free to express their moral disagreement with a law but [are] not free to decline to enforce [a law with which they disagree]. And one of Judge McCarroll’s colleagues in Shelby County had this to say, “I didn’t swear to uphold all of the laws of Tennessee except for X, Y, and Z. [A judge] is sworn to uphold the law whether you agree with it or not.”<sup>115</sup> As Professor Bruce Ledewitz notes, judges are expected to “take any case to which they happen to be assigned.... No provision is made for recusal in the case of particular laws regarded by the judge as immoral.”<sup>116</sup> If a judge were to recuse himself because he believed the law was too evil to be enforced, the judge has failed to do his job. Ledewitz concludes that resignation, not recusal “is the only form of non-cooperation open to a sitting judge.”<sup>117</sup>

Judge McCarroll, however, argued that his recusal from these cases was both appropriate and required. He noted that “[a] judge should recuse himself

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<sup>115</sup> Liptak, *supra* note 112, at 21. The experts were contacted by Judge McCarroll’s colleague, Judge D’Army Bailey. See D’Army Bailey, *The Religious Commitments of Judicial Nominees – Address by Judge Bailey*, 20 NOTRE DAME J. OF LAW, ETHICS & PUB. POL’Y 443, 444 (2006) (“If a judge could not enforce the law, then, as people have often had to do when they face matters of conscience, the judge should pay the price of his or her conscience. The price of a judge’s conscience would be to step down from the bench.... I disagree with the proposition that a judge should have a blanket recusal in cases of this sort.”). *But see* Hartnett, *supra* note 47, at 260-64 (arguing that resignation is “unnecessary overkill” unless the frequency of recusals results in an unfair burden on the judges to whom the cases are ultimately assigned; in this respect recusals on moral grounds are no different from recusals on other grounds).

<sup>116</sup> Ledewitz, *supra* note 88, at 32.

<sup>117</sup> *Id.* at 33. Ledewitz proposes the adoption of a sort of judicial “conscience clause” that would allow judges to opt out of all death penalty and abortion cases. This would allow judges with opposed to abortion and the death penalty to preserve their moral integrity and witness to the value of life by refusing to kill, without depriving the community entirely of their talent and wisdom in other cases. *Id.* at 3, 33-34.

or herself if there is any doubt about the judge's ability to preside impartially or if the judge's impartiality can reasonably be questioned."<sup>118</sup> Judge McCarroll's argument is persuasive: if a judge cannot in good conscience issue an order to which a minor seeking an abortion may be legally entitled, the judge cannot reach an impartial decision in the case and should recuse himself or herself.<sup>119</sup>

### Case #3

Does a judge who wants to be faithful to the Church's teaching on the death penalty culpably cooperate with evil by participating in the judicial proceedings associated with capital punishment? As the abortion cases just discussed suggest, this is a complex question because of the variety of roles that judges can

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<sup>118</sup> Liptak, *supra* note 112. See also Pryor, *supra* note 41, at 361 (arguing that recusal allows the judge both to honor the law "by refusing to disobey it" and honor his conscience "by avoiding cooperation with evil"; "The judge cannot be impartial to his moral duty, and [the canons of judicial ethics] require[ ] a judge to 'disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.' The law acknowledges that judges, in rare cases, should step aside.").

<sup>119</sup> See Hartnett, *supra* note 47, at 259; Treadwell, *supra* note 103, at 875 ("If the judge's moral beliefs about abortion are so embedded in his conscience that he cannot bring himself to neutrally apply the law, he should recuse himself from the case."); *id.* at 877 ("Based on the current state of the law on judicial recusal, state court judges who recuse themselves from cases where minors petition the court for a waiver of the parental consent laws do not violate their ethical obligations as a member of the judiciary. Rather, judges, who because of strongly held religious or moral beliefs about abortion cannot impartially apply the law, appropriately recuse themselves from such cases."); Osborn, *supra* note 8, at 903 ("A judge who determines himself to be partial can disqualify himself under the Judicial Model Code."). As Judge G. Gary Tyack of the Franklin County (Ohio) Court of Appeals explained, "[T]he decision about whether or not to allow a young woman to terminate the pregnancy without parental notification should not simply reflect the preconceived notions of a given judge. ... As a result, we strongly encourage any judge who cannot fairly and impartially consider these important issues to recuse himself or herself from involvement in such proceedings." Catherine Candisky, *Judges Overrule Twyford*, COLUMBUS DISPATCH, April 4, 1993, at 1B (quoting Judge Tyack); *but cf.* Hon. Ann Crawford McClure, Richard Orsinger, and Robert H. Pemberton, *A Guide to Proceedings Under the Texas Parental Notification Statute and Rules*, 41 S. TEX. L. REV. 755, 801 (2000) (noting that, while the rules do allow for recusal "where constitutional grounds for disqualification or compelling grounds for recusal arose", "there was at least some anecdotal evidence of legislative intent not to allow recusal ... when bases solely on a judge's views concerning abortion"); *id.* at 801 n. 234 ("[R]ecusal should not be allowed because 'this issue is not about the judge[']s views on abortion[.]'" Instead, the only issue before the judge is "whether the minor proves the statutory grounds for waiver of notification.") (quoting Report of the Special Subcommittee on Implementation of Family Code Chapter 33, Appendix F).



play in the legal proceedings surrounding capital punishment. The cooperation analysis will depend on just what sort of role the judge is playing.

The Church does not teach that the death penalty is an intrinsic evil. This makes imposition of the death penalty different from the intentional taking of innocent life involved in abortion. The current Catechism of the Catholic Church, however, does insist that the death penalty can only be used when it is the only possible way of effectively defending human lives against an unjust aggressor. When non-lethal means are available to protect people's safety, the state should limit itself to using those non-lethal means, because they are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person. Under contemporary conditions in a developed country like the United States, society can be adequately protected by keeping criminals securely incarcerated.<sup>120</sup> In light of this teaching, it is difficult to imagine when the imposition of the death penalty could be characterized as a just punishment in the United States.

Thirty-eight states and the federal government, however, do authorize use of the death penalty in some cases.<sup>121</sup> Can a judge who accepts the church's teaching on the death penalty participate in judicial proceedings that will culminate in the imposition of an unjust penalty? Can a Catholic judge cooperate

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<sup>120</sup> CATECHISM OF THE CATHOLIC CHURCH #2267 (citing John Paul II, *Evangelium Vitae*, *supra* note 12, at #56).

<sup>121</sup> See *Roper v. Simmons*, 543 U.S. 551, 595 (2005) (O'Connor, J., dissenting) (noting that 12 states and the District of Columbia do not have the death penalty, while the remaining states and the federal government authorize the death penalty).

with the “machinery of death”? Justice Scalia, who rejects the Church’s teaching on the death penalty,<sup>122</sup> argues that Catholic judges who share the Church’s understanding of the death penalty should resign their office if they are unable to uphold the laws they are sworn to enforce.<sup>123</sup>

A more carefully reasoned analysis of the problem is provided by Dean John Garvey and Professor Amy Coney Barrett in a 1998 *Marquette Law Review* article entitled, “Catholic Judges in Capital Cases.”<sup>124</sup> They argue that Catholic judges who accept the teaching of the Church are morally precluded from enforcing the death penalty. Determining whether this judgment of conscience will require the judge to recuse herself from participating in a capital case, however, will depend on the particular role that judge plays in the proceedings. For example, a judge who accepts the Church’s teaching should withdraw from any role that will require her to impose a sentence on a defendant in a death

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<sup>122</sup> See Scalia, *supra* note 30.

<sup>123</sup> *Id.* (“[I]n my view, the choice for the judge who believes the death penalty to be immoral is resignation rather than simply ignoring duly enacted constitutional laws and sabotaging the death penalty. He has after all, taken an oath to apply those laws, and has been given no power to supplant them with rules of his own.”). Unlike Justice Scalia, U.S. Magistrate Judge Michael R. Merz believes that the Church’s teaching on the death penalty is correct. See Merz, *supra* note 25, at 311-13, 318. At the same time, however, Magistrate Judge Merz concludes that he and other Catholic judges can in good conscience preside over death penalty cases:

Because the prudential judgment about whether capital punishment remains necessary to defend innocent life is one about reasonable, moral people can differ, whether we shall have it or not should be left to the mechanism of democracy. Where the legislature has made a different judgment from the pope, a Catholic can still be a conscientious judge and participate in capital cases.

*Id.* at 318. Magistrate Judge Merz does not, however, address the question of how a judge who himself or herself believes that the imposition of the death penalty is immoral and unjust can cooperate in the judicial proceedings leading to the imposition of the death penalty without doing damage to his or her own moral integrity. The cooperation analysis discussed in this Essay provides a set of analytical tools for addressing that important question.

<sup>124</sup> John H. Garvey and Amy V. Coney [Barrett], *Catholic Judges in Capital Cases*, 81 MARQUETTE LAW REV. 303 (1998).

penalty case. Dean Garvey and Professor Barrett argue that a judge who imposes a death sentence is engaged in formal cooperation with an unjust act. The judge who issues a sentencing order imposing the death penalty sets in motion a process in which the government is bound to execute the defendant unless there is an executive pardon. The judge who issues the sentencing order intends that this execution should take place. Accordingly, the judge here plays a role in an unjust act that amounts to formal cooperation, which is always prohibited.<sup>125</sup>

In contrast, Garvey and Barrett argue that a judge could preside over the trial on the issue of guilt or innocence in a death penalty case, so long as the judge does not participate in the sentencing phase of the proceedings.<sup>126</sup> The judge here would be engaged only in material cooperation in the death sentence that might or might not be imposed on a defendant found guilty at trial. Would the judge have a proportionate reason that justifies such material cooperation? Garvey and Barrett argue that the judge would have a strong reason to preside over the trial on the issue of guilt. Society needs judges to enforce the criminal law. Such judges help maintain a peaceful and just society. It is this social good that should be weighed against the harm of material cooperation. The evil of capital punishment is grave – it amounts to the unjust taking of human life. But the judge here does not actually participate in the sentencing, and does not know

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<sup>125</sup> *Id.* at 321-24. *But cf.* Hartnett, *supra* note 47, at 242-46 (suggesting that, because a sentencing order might be understood not as permission to the executive to kill, rather than a command to kill, sentencing a defendant to death may not always amount to formal cooperation).

<sup>126</sup> Garvey & Barrett, *supra* note 124, at 324-25.

for certain that the death penalty will actually be imposed when the sentencing phase of the case takes place. Recusal would not prevent the evil, because the judge would simply be replaced by another judge. For these reasons, Garvey and Barrett conclude that the material cooperation in capital punishment provided by the judge's participation in the guilt phase of the case is morally justified.<sup>127</sup>

The most difficult question of cooperation to analyze in the death penalty context might be faced by a judge reviewing a death sentence on direct appeal.<sup>128</sup> Such a judge may not intend that an execution take place; affirming the sentence simply means that the trial court has followed the law in imposing the death penalty. The appellate judge, therefore, need not be characterized as intentionally directing or promoting the defendant's execution in a way that amounts to illicit formal cooperation in the execution. But affirming the sentence would be an act of material cooperation that allows the execution to go forward. Is the material cooperation involved in affirming the death sentence justified by a proportionate reason?

Garvey and Barrett are unsure whether the judge should reach that conclusion. Their uncertainty is rooted in their sense that most people would probably understand the act of affirming the death sentence as endorsement of death sentence.<sup>129</sup> This raises the issue of scandal. Moral theologian Germain

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<sup>127</sup> *Id.* at 325.

<sup>128</sup> *Id.* at 326-29.

<sup>129</sup> *Id.* at 328-29.

Grisez explains that “[s]ometimes the fact that ‘good’ people are involved [in a process that leads to wrongdoing] makes wrongdoing seem not so wrong and provides material for rationalization and self-deception by people tempted to undertake the same sort of wrong. . . . [O]ften the material cooperation of ‘good’ people in wrongdoing leads others to cooperate in it formally.”<sup>130</sup> These considerations lead Garvey and Barrett to conclude that it is exceedingly difficult to pass general judgment on the morality of participating in the direct appellate review of capital sentencing.<sup>131</sup> An appellate judge attentive to the potential for scandal involved in affirming a death sentence might, for example, effectively reduce the risk of scandal by writing an opinion that highlights the distinction between legal judgment and moral judgment and lets others know that “cooperation does not imply approval.”<sup>132</sup>

A Supreme Court justice like John Roberts, however, is not likely to be involved in this sort of direct appellate review of a particular capital sentence. The Supreme Court typically gets involved in the issue of the death penalty in a less direct way. The Supreme Court may be asked to decide whether the lower court proceedings afforded the defendant all the procedural rights required by the Constitution, or whether the capital sentencing law enacted by Congress or a state legislature is consistent with the Eighth Amendment’s prohibition of cruel and unusual punishment. The questions here boil down to whether or not other

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<sup>130</sup> *Id.* at 329 (quoting GERMAIN GRISEZ, 3 THE WAY OF THE LORD JESUS: DIFFICULT MORAL QUESTIONS 881 (1997)).

<sup>131</sup> *Id.*

<sup>132</sup> Hartnett, *supra* note 47, at 268.

political actors have made decisions that are authorized by the Constitution. A Supreme Court justice might well conclude that the Eighth Amendment does not prevent Congress or a state legislature from enacting the death penalty.<sup>133</sup> That conclusion of constitutional law is difficult to characterize as a moral endorsement of the legislature's independent choice to in fact authorize use of the death penalty. The judicial act of choosing not to undo the constitutionally authorized decision of another political actor is, therefore, a form of remote material cooperation that can be justified by the judge's duty to faithfully interpret the Constitution and respect the division of authority established by the Constitution.<sup>134</sup>

### Conclusion

The conclusions proposed for each of the cases discussed in this Essay may well be open to reasonable debate. One thing, however, should be clear: careful attention to the role being played by the judge in a given case is essential to an adequate analysis of the cooperation issue. Contrary to Professor Turley's suggestion, it is highly unlikely that a Supreme Court justice like John Roberts will find himself facing the sort of conflict between conscience and the Constitution that might require him to withdraw from participating in an abortion or death penalty case. Indeed, trial judges – who may be required by the law to issue orders authorizing a minor's abortion in a parental involvement

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<sup>133</sup> Garvey & Barrett, *supra* note 124, at 330.

<sup>134</sup> *See id.* at 331.

bypass hearing or enforcing the death penalty in the sentencing phase of a capital case – are more likely to face a conflict between conscience and the law that might demand recusal in order to avoid culpable cooperation with evil.

In the end, the willingness of judges, legislators, and voters to wrestle with the question of cooperation is at least as important as the particular conclusions that any individual might reach in analyzing a particular case. Much of the debate about the role of Catholics in public life has failed to address this complex issue with the nuance and careful attention to role distinctions that the long tradition of Catholic reflection on the principle of cooperation offers to us.<sup>135</sup> We should, therefore, attend to the question of cooperation with evil with conscientious care, because the principle of cooperation is not simply a matter of abstract theological speculation. At the heart of the analysis that has developed around the principle of cooperation is the question of what sort of people we will become through our actions in the world.<sup>136</sup> Those actions – including our actions in public life when we decide cases as judges and cast votes as legislators or as citizens – shape our characters, and thereby influence the kinds of people we will become.<sup>137</sup>

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<sup>135</sup> Cf. Richard A. McCormick, S.J., *Vive le Difference! Killing and Allowing to Die*, 177 *America* 6, 12 (1997) (“I end with a well-known aphorism: *Qui bene distinguit bene cognoscit* (the person who distinguishes well understands well).”).

<sup>136</sup> See M. Cathleen Kaveney, *Tax Lawyers, Prophets and Pilgrims: A Response to Anthony Fisher*, in *COOPERATION, COMPLICITY & CONSCIENCE: PROBLEMS IN HEALTHCARE, SCIENCE, LAW AND PUBLIC POLICY* (Helen Watt, ed., 2005), at 66; see also Häring, *supra* note 49, at 495 (“guilty cooperation above all violates Christian love of self”).

<sup>137</sup> See Hartnett, *supra* note 47, at 256 (“There is some risk to the *judge* from repeated material cooperation.”); *id.* at 268 (urging judges to “take care that the cumulative impact of material cooperation does not lead you to slide from material to formal cooperation or alter your fundamental [moral] commitment”); Ledewitz, *supra* note 88, at 3 (“The community should not command judges with moral

We could avoid some difficult questions by fleeing from participation in public life in an effort to insulate ourselves from any risk of ever cooperating in another person's wrongful action.<sup>138</sup> But this would be a serious mistake.

Bernard Häring puts the issue clearly in focus:

It might be very easy for one who has withdrawn from the world and who is concerned only with the salvation of his own soul to condemn with smug horror every species of material cooperation. But one who "in the world" wills to be active for the kingdom of God and the salvation of those who are in spiritual jeopardy will view the matter in quite a different light. He is faced with a serious problem. Any hyper-rigorous stance respecting material cooperation ... simply renders the exercise of the lay apostolate totally impossible. Anyone who sets up in his moral code the rigid principle forbidding any action which might be perverted by others must, to cite but one example, renounce politics entirely. He will be obliged to remain aloof from many significant areas of apostolic activity.<sup>139</sup>

The gospel calls us to cooperate with God's love at work in the world through the ways in which we live our daily lives in the world. We respond to this call to cooperate with God's love in the midst of the concrete demands of our lives as judges, legislators, lawyers, and voters.<sup>140</sup> As we try to cooperate with God's Spirit at work in a human community that is also marked by ambiguity

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qualms to order abortions or sign death sentences. If these judges obey, they have to that extent diminished their humanity.").

<sup>138</sup> See Kaveny, *Tax Lawyers, Prophets, and Pilgrims*, *supra* note 136, at 69. As Dean Garvey notes, "[W]e should not be too hasty to assume that our legal system is corrupt, and that the best way to defend our virtue is to steer clear of it. The moral life is more complicated than that." John Garvey, *Law & Morality: Divorce, the Death Penalty, and the Pope*, COMMONWEAL 10, 12 (April 19, 2002).

<sup>139</sup> HÄRING, *supra* note 49, at 499-500.

<sup>140</sup> See, e.g., HÄRING, *supra* note 49, at 494 ("God has made us instruments and collaborators in the establishment of His kingdom of love.") *Id.* at 452 (Baptism "imparts to the Christian a grace-giving participation in the redemptive vocation of Christ so that in Christ and with Christ he cooperates in the salvation of the world.... He cooperates in a transformation of the arena of his life which redounds to the honor of God and the salvation of souls."). If we withdraw from the world "in order to be totally unblemished by the corruption of the great masses", how can we "bear witness in the midst of the world to the divine love and cooperate in the fellowship of love reaching out to embrace all mankind?" *Id.* at 494.



and sin,<sup>141</sup> we need to pay attention to these questions: Who are we becoming as people through the actions that form us as we strive to serve the common good in our varied public roles? Are we becoming ever more faithful to our mission as disciples to be light and salt for the world,<sup>142</sup> or does our cautious inaction in the face of the world's needs itself increase scandal?<sup>143</sup> My hope is that this Essay might offer some analytical tools to help us all attend more faithfully to these central questions of conscience.

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<sup>141</sup> See Kaveny, *Tax Lawyers, Prophets, and Pilgrims*, *supra* note 136, at 74-75. See also BERNARD HÄRING 2 FREE & FAITHFUL IN CHRIST 479 (1979) (“[W]e all occasionally discover to our horror that what we have done with the best of intentions has been used by others to carry out their nefarious designs. What conclusions does Catholic moral theology draw from this accidental tragic connection of good actions with the machinations of the spirit of darkness? Surely we cannot withdraw to the point of missing our calling to be yeast in the dough, salt to the earth.”).

<sup>142</sup> HÄRING, 2 FREE & FAITHFUL IN CHRIST, *supra* n. 141, at 483 (“The discerning judgment will always take into account the mission of the disciples of Christ to be light and salt to the world.”); see Matthew 5:13-16.

<sup>143</sup> As Häring explains, allowing a fear of causing scandal to cause us to withdraw from action in the world may itself risk infidelity to our mission to serve God's Kingdom:

It is a serious duty to take into consideration the weakness of another insofar as this redounds to the good of his soul and is within the bounds of sound reason. However, we may not permit this concern for the frailty of others to divert us to a mode of action which in the long run would prove even more hazardous .... *Nor may consideration for human frailty in others be carried to the extreme of jeopardizing our capacity for essential decisions and joyful effort for the Kingdom of God.*

HÄRING, *supra* n. 49, at 480 (emphasis added).