JUDGING CATHOLICS:

NATURAL LAW, THE CATHOLIC CHURCH AND THE SUPREME COURT

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1. Introduction

1.1 This paper considers certain aspects of the inter-relationship between Catholicism and public life, looking particularly at the duties of a (Catholic) judge in civil society. The underlying central premise of the paper is, however, that Catholicism is not monolithic. Instead, a long standing tension within Catholicism exists between those whom I will term "conformist Catholics" and "non-conformist Catholics". This is not the same distinction as between saints and sinners, or between self-proclaimed "traditional(ist)" Catholics and liberal Catholics. Non-conformity within Catholicism can call upon a long and continuing tradition within the Church, [1] going back at least to the time of Saint Augustine of Hippo. [2] And, as we shall see, a non-conformist Catholic can just as easily be a political and moral conservative as a liberal. The difference between conformist and non-conformist Catholics focuses rather on the conscience of the individual Catholic and on the binding nature of Church teaching.

1.2 For the conformist Catholic there is no primacy of individual conscience within the Church: once the Vatican has definitively spoken on a particular aspect of faith or morals a Catholic is bound to conform his or her will, intellect and action to that teaching. [3] The implicit model used is that to be a member of the "Church militant" is to be like a soldier in the army – one's role is not to question commands but rather to obey them, heart and soul. [4] The Church is said to speak and guide in the "truth", and the following of this objective and timeless truth - rather than fallible individual judgment - is to be preferred in all things and on all occasions. [5] Because such strong truth claims are made of and for Catholicism on this model, the conformist Catholic will characteristically deny that official Church teaching has ever reversed or contradicted itself – there has been no "about turn" barked in the Church militant's parade ground. Thus any apparent change in Church teaching over time has to be explained (or explained away) as a natural and necessary development of the Catholic Church's position [6] but which is wholly consistent with prior teachings which remain true and valid. The deposit of Faith is left untouched. [7]

1.3 For the non-conformist Catholic, by contrast, the pronouncements of the official Church on moral issues are highly relevant and weighty considerations which the individual Catholic is obliged to take very seriously into account and inform his or her conscience in the light of this teaching. But ultimately the decision on how to act on a particular issue is a matter for the individual Catholic acting in accord with the demands of conscience - which may, but may not *always*, conform to what the official Church seems to teach, or to demand at any particular time or era. That is not to say that the non-conformist Catholic claims that in acting in accordance with the judgment of individual conscience, he or she has actually objectively done the right thing, that one own conscience is an *infallible guide* to right conduct. Instead the position of the non-conformist Catholic is that it is morally necessary to follow the judgment of one's conscience, even if it turns out to have been mistaken, in order to maintain one's integrity and status as a moral agent. To be a Catholic is not to commit either intellectual or moral suicide The following of the individual judgment of conscience is a necessary - though not sufficient – requirement for any moral action. Ultimately God will decide.

1.4 The relevance of this distinction between conformist and non-conformist Catholicism for the topic of this paper is this. The conformist Catholic characteristically denies that the non-conformist Catholic can, in good faith, remain within the Church and that the only proper option is for the non-Conformist publicly to renounce his or her Catholicism. The non-conformist Catholic will say, by contrast, that the political and moral analysis implicit within conformist Catholicism is simply not compatible with the holding of public office within a democracy. Accordingly if the conformist vision of Catholicism is correct and is the only possible way of being Catholic, then they are committed to the proposition that Catholics must, in conscience, resign and withdraw from public life. There are therefore big issues at stake both for the Catholic Church and for society at large in the understanding and resolution of these matters.

1.5 It should be stressed that to look at these issues does not in any way involve a breach of either the letter or the spirit of Article VI(3) of the US Constitution, which provides, so far as relevant that:

> "[A]ll executive and judicial officers, both of the United States and of the several States shall be bound by Oath or Affirmation to support this Constitution but no religious test shall ever be required as a qualification to any Office or public Trust under the United States".

1.6 The clause imposes a requirement that all holders of public office within the United States and in the several States constituting the Union to swear an oath to support the constitution of the United States. [8] Separately it prohibits the Federal Government from imposing any form of religious test as a qualification for any Office or public Trust under the United States. Article VI leaves untouched the power of the individual States to impose such tests in respect of public offices of those individual States, [9] but makes the oath to support the United States constitution as effectively a *substitute* for any *federally imposed* religious test. [10] Such religious tests - modeled on those which had been required for the holding of public office under the formerly distinct Crowns of England [11] and Scotland [12] respectively - continued to be required of those who would hold office in many of individual States of the Union. [13] As was observed at around the time of the ratification of the Constitution:

> "A religious test is an act to be done, or a profession to be made relating to religion (such as partaking of the sacrament according to certain rites and forms, or declaring one's belief of certain religious doctrines) for the purpose of determining whether his religious opinions are such that he is admissible to a public office." [14]

1.7 So, in asking these questions about the relationship of religious beliefs to the carrying out of duties under a public office one is not imposing any *religious test*, requiring that one profess a particular religious belief or beliefs in order to hold office. Rather than applying such a religious test for office, the question I am interested in examining is whether the religious beliefs and stance actually proclaimed by any individual are, in fact, compatible with the prior oath to support the Constitution. [15] We are examining a fundamental constitutional requirement of Article VI, and this it seems to me is constitutionally legitimate - indeed constitutionally required. [16] It is not an exercise in ant-Catholic prejudice: [17] I write this paper as a practising Catholic and as a practising lawyer.

1.8 The basic issue is this: do all those who would exercise judicial office under the constitution regard themselves as solemnly bound, whether by oath of affirmation, to "support this Constitution" and to uphold "the Constitution and the laws of the United States which shall be made in pursuance thereof" as "the supreme Law of the Land" ? Rather than the imposition of any religious test, an inability or unwillingness (whether on religious or other grounds) unequivocally to subscribe to this fundamental

constitutional proposition may properly be regarded as a *disqualification* from holding any executive, legislative or judicial office under the Constitution.

2. Moral questions and judicial decision-making

2.1 As noted at the outset, this paper seeks to raise a number of questions about the inter-relationship of religion, specifically Catholicism, to the judicial role in civil society. The most important questions in relation to judging Catholics seems to me to be the following:

(1) Does the fact of a judge's Catholicism impact upon his or her judicial role such that, because of considerations derived from his or her religion, the Catholic judge might be led (or compelled) by Church teaching to come to a different decision in a particular case from a non-Catholic?

(2) If so, is this compatible with the duty of the judge to uphold and law and constitution under which he is appointed, specifically in the United States context with the obligation under Article VI to support the Constitution and uphold it and the laws made under it as the "supreme Law of the Land" ?

2.2 In helping us to consider these general issues, it is useful to call to mind real cases where the official teaching of the Catholic Church might be thought to impact upon particular social issues or legal questions which might conceivably come before a judge for decision. Recent issues of some moral complexity in the law which have come before European and (North and Latin) American courts have included the following:

(i) whether a parent has a right to be informed if their child under the age of consent seeks medical advice assistance on contraception; [18]

(ii) whether charities affiliated to the Catholic Church can be legally required to offer to their employees health insurance which includes the provision of contraceptives [19]

(iii) whether the prescription or supply of the "morning after" pill constituted the unlawful "procuration of a miscarriage" rather than the lawful provision of a "contraceptive"; [20]

(iv) whether the assisted suicide of the terminally ill can be authorised and lawfully carried out [21]

(v) whether an individual should be able to insist on the continued provision of artificial nutrition and hydration in the event of his incapacity and even against medical advice; [22]

(vi) whether a comatose patient in a persistent vegetative state may lawfully be deprived of artificial nutrition and hydration. [23]

(vii) whether conjoined twins may be surgically separated, notwithstanding that the inevitable result would be the death of one of them; [24]

(viii) whether a pregnant woman can be compelled to undergo a Caesarean section in order to ensure the safe and healthy delivery of her child; [25]

(ix) whether parents may recover damages in respect of the birth to them of a healthy child following a failed sterilisation; [26]

(x) whether the father of a child *in utero* may obtain a court order to prevent a woman from having an abortion of their child; [27]

(xi) whether a woman has a positive constitutionally protected right to an abortion in situation in which carrying a pregnancy to full term may adversely affect her health, [28] or where the pregnancy is a result of rape or incest, or where the unborn child is malformed such as to be incapable of independent life if born[29]

(xii) whether the court can authorise a minor to have an abortion without notifying her parents; [30]

(xiii) whether frozen embryos may be implanted in the womb of their genetic mother at her insistence against the wishes of their genetic father; [31]

(xiv) whether homosexual conduct should be decriminalised; [32]

(xv) whether the surviving member of a same-sex couple should be treated for the purposes of succession to a tenancy of their shared rented home as a member of his deceased's partner's family [33] or as a spouse [34] and/or be entitled to a widower's pension arising from his deceased partner's past employment; [35]

(xvi) whether a homosexual man [36] or a homosexual woman [37] in committed same-sex relationships should be permitted to adopt a child;

(xvii) whether same sex couples should have a right to marry one another [38] or otherwise to formal legal recognition of their relationship; [39]

(xviii) whether the mandatory imposition of the death penalty on conviction of murder on adults of full capacity was unconstitutional; [40]

(xix) whether the death penalty could either properly be imposed, as a matter of discretion, for crimes committed when the offender was under 18 at the time of the offence [41] or carried out on the mentally retarded [42]

3. Coercion and the non-conformist Catholic politician

3.1 There is no doubt that, had any of the above questions come for decision before a legislature, the hierarchy of the Catholic Church would consider those politicians who held themselves out to be Catholic would be under an obligation to vote in a manner which the bishops considered properly reflected Catholic social or moral teaching on the issue.

3.2 In a document also produced in 2002 entitled *A Doctrinal Note on some questions regarding the Participation of Catholics in Political Life*, the Congregation for the Doctrine of the Faith then headed by Cardinal Ratzinger (now Pope Benedict XVI) stated:

> "[T]hose 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. As John Paul II has taught in his Encyclical Letter *Evangelium vitae* regarding the situation in which it is not possible to overturn or completely repeal a law allowing abortion which is already in force or coming up for a vote, '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' [*Evangelium vitae,* 73][...]
> *[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*.[...]
> [N]o Catholic can appeal to the principle of pluralism or to the autonomy of lay involvement in political life to support policies affecting the common good which compromise or undermine fundamental ethical requirements.[...]
> For Catholic moral doctrine, the rightful autonomy of the political or civil sphere from that of religion and the Church *but not from that of morality* is a value that has been attained and recognized by the Catholic Church and belongs to inheritance of contemporary civilization."[43]

3.3 And in a document from June 2003 entitled *Considerations regarding proposals to give legal recognition to unions between homosexual persons* the Congregation for the Doctrine of the Faith, then still headed by Cardinal Ratzinger, then stated:

> 6. ... *[C]ivil law cannot contradict right reason without losing its binding force on conscience. Every humanly-created law is legitimate insofar as it is consistent with the natural moral law, recognized by right reason, and insofar as it respects the inalienable rights of every person. Laws in favour of homosexual unions are contrary to right reason because they confer legal guarantees, analogous to those granted to marriage, to unions between persons of the same sex.*
> ...

8. .... *The principles of respect and non-discrimination cannot be invoked to support legal recognition of homosexual unions*. Differentiating between persons or refusing social recognition or benefits is unacceptable only when it is contrary to justice. The denial of the social and legal status of marriage to forms of cohabitation that are not and cannot be marital is not opposed to justice; on the contrary, justice requires it.

...

9. [footnote] It should not be forgotten that there is always a danger that legislation which would make homosexuality a basis for entitlements could actually encourage a person with a homosexual orientation to declare his homosexuality or even to seek a partner in order to exploit the provisions of the law

10. .... When legislation in favour of the recognition of homosexual unions is proposed for the first time in a legislative assembly, *the Catholic law-maker has a moral duty to express his opposition clearly and publicly and to vote against it. To vote in favour of a law so harmful to the common good is gravely immoral.* When legislation in favour of the recognition of homosexual unions is already in force, the Catholic politician must oppose it in the ways that are possible for him and make his opposition known; it is his duty to witness to the truth. If it is not possible to repeal such a law completely, the Catholic politician ..."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, on condition that his absolute personal opposition to such laws was clear and well known and that the danger of scandal was avoided. This does not mean that a more restrictive law in this area could be considered just or even acceptable; rather, it is a question of the legitimate and dutiful attempt to obtain at least the partial repeal of an unjust law when its total abrogation is not possible at the moment." [44]

3.4 In similar terms the Pontifical Council for the Family in a document issued in June 2000 entitled "Family, Marriage and *de facto* unions" stated:

"With regard to the recent legislative attempts to make the family and *de facto* unions equivalent, including homosexual unions (it is good to keep in mind that their juridical recognition is the first step toward their equivalency), Members of Parliament should be reminded about their grave responsibility to oppose them, for lawmakers, and in particular Catholic Members of Parliaments, should not favor this type of legislation with their vote because it is contrary to the common good and the truth about man and thus truly unjust. *These legal initiatives present all the characteristics of non-conformity to the natural law which makes them incompatible with the dignity of the law*. As Saint Augustine says [45] *Non videtur esse lex, quae iusta non fuerit* [an unjust law is not seen as law]"[46]

3.5 The Code of Canon Law of the Catholic Church provides as follows:

"Can. 1311 The Church has the innate and proper right to coerce offending members of the Christian faithful with penal sanctions.

...

Can. 1312 §2. The law can establish other expiatory penalties which deprive a member of the Christian faithful of some spiritual or temporal good and which are consistent with the supernatural purpose of the Church.

...

Can 1348 When an accused is acquitted of an accusation or when no penalty is imposed, the ordinary can provide for the welfare of the person and for the public good through appropriate warnings and other means of pastoral solicitude or even through penal remedies if the matter warrants it."

3.6 There is also no doubt that some within the hierarchy of the Catholic Church believe, in the light of these documents and the relevant provisions of Canon law, that they have the right to *instruct* – under threat of ecclesiastical sanctions ranging from public denial of communion [47] to formal excommunication [48] - Catholics in public life as to how they should perform the duties of their public office. The case of Senator John Kerry in the course of the 2004 US Presidential election campaign being denounced by Archbishop Raymond Burke of St. Louis as a public sinner on the grounds of his alleged "pro-choice" voting record in the US Senate is simply one notable example of this phenomenon of Catholic bishops seeking to use their ecclesiastical authority over individual Catholics to influence political outcomes. A more recent example of the same phenomenon, coming in the wake of the visit of Pope Benedict XVI to the United States, has been the instruction given by Archbishop Joseph Naumann of Kansas City to the Governor of Kansas, the Catholic Kathleen Sebelius, not to present herself for communion within the State of Kansas until she publicly repented of her political record on the abortion issue. [49] For bishops such as these, keen to coerce conformity, references to "the moral duty of Christians to act according to their conscience" refers only to act in accordance with those individual judgments which in fact reflect and completely conform to the official position adopted by the Catholic Church authorities, holding that obedience to objective (revealed/Catholic/divine ?) truth as expressed by the Church's *Magisterium* rather than the judgment of individual conscience (however well-informed) must be given primacy to be properly faithful to the Catholic tradition.[50]

4. Freedom only to follow: the conscience of the conformist Catholic

4.1 Other conformist Catholics go so far as to claim that although the Catholic Church has proclaimed since 1965 [51] the fundamental right to freedom of conscience, the Church allows for freedom of conscience only to those outside the Church and gives none to those who would remain within it. Thus Professor Robert George has written:

> "Pope Pius X ... condemns the view that '[i]n proscribing errors, the Church cannot demand any internal assent from the faithful by which the judgments she issues are to be embraced'. [52] In other words, according to Pius X, the Church may demand the *internal assent* of its members. Vatican II asserts that man 'is not to be forced to act in a manner contrary to his conscience'. [53] Is this a contradiction ? While Pius X speaks to the *Church's* right, *Dignitatis Humanae* speaks of *individual's* right. These rights do not contradict each other. *The Church present the truth undiminished and may demand that its members adhere to its tenets. But individuals are free in the civil order to leave the Church, if that is what they wish to do. Dignitatis Humanae* expressly 'leaves untouched traditional Catholic doctrine on the moral

duty of men and societies towards the true religion and toward the one Church of Christ [54] – precisely the moral duty that Pius X was at pains to assert – but supplements that teaching with new (but not contradictory) teaching on how the individual is to find that truth." [55]

4.2 And Professor Robert George has also written that:

"[With] Vatican II's development of doctrine on religious liberty ... [a] new norm, *conferring a certain immunity from coercion upon non-Catholics in matters of religious expression*, there emerged from sustained reflection , in the light of experience, upon the inviolable freedom of the act of faith. … [Footnote] *We do not suggest- in fact we deny – that Dignitatis Humane contradicts any proposition previously taught by the Church as surely true*." [56]

4.3 But among the propositions previously taught and maintained by the Catholic Church are those contained in his 1832 general encyclical *Mirari Vos,* [57] in which Gregory XVI denounced not only "the detestable insolence and improbity of those who, consumed with the unbridled lust for freedom, are entirely devoted to impairing and destroying all rights of dominion while bringing servitude to the people under the slogan of liberty" (paragraph 19), but also those who cleaved to the "absurd and erroneous proposition which claims that liberty of conscience must be maintained for everyone" (paragraph 14) or who sought that there should be "freedom to publish any writings whatever and disseminate them to the people" (paragraph 15) or who desired "to separate the Church from the state, and to break the mutual concord between temporal authority and the priesthood". "It is certain", says Gregory XVI "that that concord which always was favourable and beneficial for the sacred and the civil order is feared by the shameless lovers of liberty" ((paragraph 20).

4.4 Similarly in 1864 Pius IX issued the *Syllabus of Errors* in which he set out a series of eighty numbered propositions, formulated under reference to arguments set out in his previous writing, to be condemned, as erroneous and wholly false. He lists among the condemned errors the idea that:

- "every man is free to embrace and profess that religion which, guided by the light of reason, he shall consider true";
- that "Protestantism is nothing more than another form of the same true Christian religion, in which form it is given to please God equally as in the Catholic Church";
- that "Roman pontiffs and ecumenical councils have wandered outside the limits of their powers, have usurped the rights of princes, and have even erred in defining matters of faith and morals";

- that “the [Catholic] Church ought to be separated from the .State, and the State from the Church”;

- that “in the present day it is no longer expedient that the Catholic religion should be held as the only religion of the State, to the exclusion of all other forms of worship” 13 or, finally,

- that “the Roman Pontiff can, and ought to, reconcile himself, and come to terms with progress, liberalism and modern civilization”.

4.5 And with particular reference to the situation of the Catholic Church in the United States of America, Pope Leo XIII observed in 1895:

> “[I]t would be very erroneous to draw the conclusion that in America is to be sought the type of the most desirable status of the Church, or that it would be universally lawful or expedient for State and Church to be, as in America, dissevered and divorced. The fact that Catholicity with you is in good condition, nay, is even enjoying a prosperous growth, is by all means to be attributed to the fecundity with which God has endowed His Church, in virtue of which unless men or circumstances interfere, she spontaneously expands and propagates herself; but she would bring forth more abundant fruits if, in addition to liberty, she enjoyed the favour of the laws and the patronage of the public authority. [58]

4.6 Certainly as late as 1955 the repeated attempts by the American Jesuit theologian John Courtney Murray to reconcile the conceptions of religious liberty, freedom of conscience and separation of Church and State as set out in the United States constitution with the political theology of the Catholic Church [59] was seen to be incompatible with Catholic teaching. [60] The four propositions in respect of which Murray was “tried” by the Vatican authorities (apparently in his absence without any formal hearing) and condemned were these:

> (1) “The Catholic confessional State, professing itself as such, is not an ideal to which organized political society is universally obliged
>
> (2) Full religious liberty can be considered as a valid political ideal in a truly democratic State
>
> (3) The State organized on a genuinely democratic basis must be considered to have done its duties when it has guaranteed the freedom of the Church by a general guarantee of liberty of religion
>
> (4) It is true that Leo XII has said that ‘it is not lawful for the State, any more than for the individual, either to disregard all religious duties or to hold in equal favour different kinds of religion; that the unrestrained freedom of thinking and of openly making known one’s thoughts is not inherent in the rights of citizens.’ 82 Words such as these can be considered as organized on a basis other than that of the perfectly democratic State but to this latter are not strictly speaking applicable.” [61]

4.7 In contra-distinction to Murray, the Holy Office re-affirmed "traditional" official Catholic teaching on the "proper" relationship of Church and State. This was to the following effect.

- Where Catholics were able to exercise effective control over a State then the Catholic Church should be recognized and established as the official religion within that "confessional" State. Any other religious or other Christian denominations should *not* be treated on a par with Catholicism as this would be to condone their errors. Where the Catholic Church was established, non-Catholic churches might receive (minimal) State recognition but no State backing. The principle of equal treatment did not apply. The toleration of non-Catholic practices in such a State might be permitted simply as a reluctant and limited concession to what was expedient or practicable or, latterly, internationally acceptable. [62]

- By contrast, where Catholicism was in the minority, the Catholic Church would demand recognition from and protection by the State authorities. The double standard evident in this position was specifically defended by Cardinal Ottaviani of the Holy Office stating that "it ought not to be considered strange that the Church appeals at least to the rights of man, when the rights of God are not recognized." [63]

4.8 On the question of whether the Catholic Church after the Second Vatican Council clearly and unequivocally reversed this traditional teaching on the responsibility of Catholics to seek where possible the formal establishment of Catholicism within the (American) State, Professor Robert George would seem to express a certain coy agnosticism, stating:

> "Many suppose that the received teaching, absent circumstances preventing it, required some sort of Catholic establishment of religion, defined not with regard to any particular privilege, but rather as recognition by the State – or at least the political community in some audible way – of the truth of Catholicism. *We do not take a position on the content of the traditional doctrine*. But supposing that it to be as we have described it, we do not think John Paul II said anything squarely contradictory of it." [64]

5. The Church and the Catholic jurist – some current issues

The judge and the death penalty

5.1 While it seems clear enough that the official Church view is that it does have a right – indeed, it would claim, an obligation - to tell democratically elected and democratically answerable Catholic politicians how to vote within the legislature, the question remains as to whether the Church also holds that that Catholic judges are obliged, as Catholics, to have regard Church teaching on moral and social issues in coming to judicial decisions on legal questions.

5.2 The assumption from some notable jurists who also proclaim their Catholicism seems to be that considerations derived from Catholic Church may indeed have an impact on the role of the judge, and the process of judging. Thus on 25 January 2002, Justice Antonin Scalia, one of the five Catholic Justice who currently make up a majority on the Supreme Court of the United States addressed a conference held at the University of Chicago on the topic "Religion, Politics and the Death Penalty". [65] Justice Scalia made clear that his remarks had nothing to do with how he might vote as a judge in any particular case and that he took no *public* position on the policy desirability, or otherwise, of capital punishment. What he was concerned with was whether or not it could properly be said that the State had *no* moral right ever to impose and execute the death penalty. His concern with this moral question came from the fact that as, a judge within a legal system which does allow for capital punishment, his vote in any death penalty case before the US Supreme Court would determine whether or not the authorities could go ahead and put an individual to death. He was, in his own words, "part of the machinery of death" [66] when he voted for a capital conviction to be affirmed. Judges in his position could *not* disown moral responsibility for the resulting death on the basis that they were simply allowing the State to carry out an evil or immoral act (the execution of one individual) in order to avoid some greater evil. In refusing a capital appeal the judges were, in effect, themselves decreeing death, on behalf of the State. Accordingly, his view was that:

> "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."

5.3 Justice Scalia's claim that the State *did* have a moral right to impose the death penalty proceeded as follows. First, he stated that the State has a scope of moral action that goes beyond what is permitted to the individual, and so the acceptance of the fact that an individual had no right to kill another did not close off the possibility that the State may have a right to put (even an innocent [67]) man to death. Secondly, from a specifically Christian perspective, Justice Scalia noted that St. Paul advised the Romans (*Rm* 13:1-7) that the governing authorities of the State were invested with "divine authority" and that anyone who resists the authorities opposes what God has appointed. Justice Scalia accordingly had no place in his system for the possibility of civil disobedience, that is to say the claim that an individual citizen might be justified in disobeying an unjust law. [68] Finally, he noted that St. Paul explicitly conceded to the powers that be in *Romans* the right to punish wrongdoers "by the sword", and that St. Augustine, St. Thomas Aquinas and St. Thomas More all allowed for the imposition of the death penalty by the State.

5.4 Given this line of authority, Justice Scalia felt justified in expressing his unequivocal dissent to the teaching of Pope John Paul II in his 1995 encyclical *Evangelium Vitae* which put forward the view, under the general principle of "respect for life", that the death penalty might only be imposed to protect rather than avenge, and that since the protection of the community could be achieved in most cases by other means, the State could have no proper moral basis on which to justify the imposition of the death sentence. Pope John Paul II stated:

> "*[T]he problem of the death penalty*: [o]n this matter there is a growing tendency, both in the Church and in civil society, to demand that it be applied in a very limited way or even that it be abolished completely. The problem must be viewed in the context of a system of penal justice ever more in line with human dignity and thus, in the end, with God's plan for man and society. The primary purpose of the punishment which society inflicts is 'to redress the disorder caused by the offence'. Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime, as a condition for the offender to regain the exercise of his or her freedom. In this way authority also fulfils the purpose of defending public order and ensuring people's safety, while at the same time offering the offender an incentive and help to change his or her behaviour and be rehabilitated.
>
> It is clear that, for these purposes to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of *absolute necessity*: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, *such cases are very rare, if not practically non-existent*.
>
> In any event, the principle set forth in the new Catechism of the Catholic Church [at paragraph 2267] remains valid: "If bloodless means are sufficient to defend human lives

against an aggressor and to protect public order and the safety of persons, public authority *must limit itself* to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person'." [69]

5.5 Justice Scalia went so far as to suggest that such views owed more to Napoleon, Hegel and Freud rather than to the constant tradition of the Church and, perhaps, was symptomatic of a general loss of religious faith in Western European societies. He, noted:

"[T]he more Christian a country is, the less likely it is to regard the death penalty as immoral. Abolition has taken its firmest hold in post-Christian Europe and has least support in the church-going United States. I attribute that to the fact that for the believing Christian, death is no big deal. Intentionally killing an innocent person is a big deal, a grave sin which causes one to lose his soul, but losing this physical life in exchange for the next is not. … For the non-believer, on the other hand, to deprive a man of his life is to end his existence – what a horrible act ! And besides being less likely to regard death as an utterly cataclysmic punishment, the Christian is also more likely to regard punishment in general as deserved. The doctrine of free will, the ability of man to resist temptations to evil is central to the Christian doctrine of salvation and damnation, heaven and hell. The post-Freudian secularist, on the other hand, is more inclined to think that people are what their history and circumstances have made them, and there is little sense in assigning blame."

5.6 Justice Scalia concluded his address by warning that if the "Church's new, albeit non-binding position" on the immorality of the death penalty were imposed as a matter of binding teaching on the faithful, then this would require American Catholics to withdraw from public life in the United State because it would effectively disqualify them from running from political office, from sitting as judges, from working as criminal prosecutors, or from serving on juries. [70]

5.7 Scalia reaches this view on the basis that he considers it is simply not legitimate for anyone to hold that the use of the death penalty might be unconstitutional [71] on the basis that its use was explicitly contemplated those who originally ratified it. He relies, specifically, on the reference in the Fifth Amendment to "capital or otherwise infamous crimes" requiring an indictment before a grand jury indictment and on the clauses of the Fifth and Fourteenth Amendments which state that no person may be "deprived of life ... without due process of law."

The Pope and divorce

5.8 This issue of the relationship between Church teaching and the practice of law was touched on by Pope John Paul II 28 January 2002 when he attended a meeting of the

judges and lawyers who staff the Roman Rota. The Roman Rota is, in effect, the Catholic Church's Court of Appeal for ecclesiastical cases. Appeals may be made from, for example, decisions on marriage annulment applications made by diocesan marriage tribunals. In his address to these Roman canon lawyers, Pope John Paul II was concerned to set out a number of points which, in his view, followed from the Church's teaching on the indissolubility of marriage. [72] His remarks were directed at three distinct audiences: first, to lawyers and judges working in the Church courts; secondly, to legislators and the electorate in civil society; and thirdly, to lawyers and judges working in the ordinary civil courts. Thus, he first warned against any tendency on the part of the lawyers and judges of the Church courts to treat marriage annulment as a form of divorce process. Annulment is a court decree which states that that a marriage never properly existed. This may be because, for example, the marriage ceremony took place under duress or out of fear, by deceit, or with one party rejecting some of marriage's essential elements (see Canons 1095-1107). Divorce or legal separation, by contrast, are remedies in respect of a validly contracted marriage which has subsequently gone wrong. The lawyers and judges of the Church courts were warned by John Paul II to resist the temptation to pronounce decrees of annulment, that is to say to declare that a marriage was void from the outset, where such a finding is not properly supported by the true facts. Because the Church courts are an official part of the Church, John Paul II stressed the particular responsibility of the canon lawyers serving on them to avoid a situation in which the Church's teaching on marriage was seen to be undermined by a tendency on the part of the Church courts to be too ready to pronounce decrees of annulment. The Church's lawyers were, in effect, told to practise what the Church preaches. Secondly, John Paul II addressed himself to what he described as the "profound crisis of the institution of marriage in civil society". He rejected the view that the ideal of marriage as indissoluble was a matter for Church members only. In his view the ideal of indissoluble marriage should be applied to the structures of civil society as a whole and should not be confined simply to the Catholic community. He exhorted all those who believe in the indissolubility of marriage to oppose civil legislation aimed at introducing or easing divorce. He was also of the view that legislation seeking to establish a legal regime for unmarried partnerships and/or giving legal recognition to same sex unions should be opposed. Instead, he proposed, that the prevalent "divorce mentality" should be combated by the promotion of legislation which actively supported marriage and improved its social recognition, albeit

that divorce might still, in certain circumstances, be permitted. Finally, the Pope addressed remarks to the lawyers and judges involved in administering the civil law in society. He first set out his basic principle, namely:

> "Agents of law in the civil area must avoid being personally involved in anything that might imply co-operation with divorce."

5.9 What this might mean in practice was explained by Pope John Paul II in the following way:

> "In exercising a liberal profession, lawyers can always decline to use their profession for an end that is contrary to justice, such as divorce. They can only collaborate in an action of this kind when, in keeping with the client's intentions, it is not directed to the rupture of marriage, but to other legitimate effects, which can only be attained by a specific juridical ruling through the judicial avenue"

5.10 Thus, it would seem from this pronouncement that Catholic lawyers should only act in divorce cases by virtue of an application of the doctrine of double effect. That is to say, although the legal dissolution of the marriage is a foreseeable consequence of the action, their primary involvement in these cases is simply with the intention of safeguarding associated legal rights for innocent parties to the divorce, for example the wronged spouse or the children of the union, if there is no other way of resolving the marital crisis. In essence, it would appear that the view of John Paul II is that Catholic lawyers can act only for the wronged party in a divorce case, and where it is not clear where the wrongs lie should not act for either party. In this way, apparently, the Pope considers that

> "lawyers truly become servers of individuals' rights, and avoid becoming simple technicians at the service of any interest".

5.11 But the late Pope's understanding of the role of lawyers in civil society betrays it seems to me as a practising lawyer a fundamental misunderstanding on the role of lawyers within society. It is not, in fact, for the legal practitioner to judge the moral worth of an individual's suit. The duty of the lawyer is to represent the client, and not himself or herself. The skill of the lawyer is put at the service of the client, to ensure, ultimately, that the client's legal rights are fully and properly presented and protected and a fair trial results. It is in this way that justice, the rendering to each of that which is properly due to them, is done. Individuals, no matter how immoral, how unpopular or how apparently guilty, have a *right* to legal representation. The corollary of this is that lawyers have a

duty to provide legal representation to the best of their ability, no matter what their personal views may be concerning the rightness of the cause. [73] The justice of the cause is judged, not by the conscience of the lawyer, but by the judge in accordance with the law after both sides of the case have been heard and due procedures followed. In his address, John Paul II told civil lawyers that they should "avoid becoming simple technicians at the service of any interest". But being a lawyer is precisely that: to be at the service of any interest which requires legal assistance. To characterise such a position, in the words of the Pope, as being a "simple technician" rather than "a server of individuals' rights" is unfair and misleading. The duty of the lawyer is to present a case in accordance with the law. That is a worthy and honourable role – The Holy Spirit is, after all, traditionally given the title of *Paraclete*, the Greek term for advocate or defence counsel. It is then the judge, and not the lawyer, who determines whether or not the case put forward is correct in law. If a lawyer were to carry out his role in accordance with John Paul II's instruction, then, before taking on a client's case, he or she would be obliged to assess the moral justice of the matter. [74] If the lawyer considered the cause to be a morally just one, he or she could then, in conscience, act for the client. There would then be a moral identification between the lawyer and the cause or client he or she represents. But this is a dangerous road to go down. It would imply that a lawyer representing, say, those accused of terrorist offences is himself a terrorist sympathiser. And it was precisely such a confusion between lawyer and client that resulted in the murders of a number of Catholic lawyers in Northern Ireland, tarred by unionist paramilitaries as IRA sympathisers or fellow travellers. But criminal defence lawyers are not, generally, criminals at heart. Neither should divorce lawyers be characterised as immoral marriage wreckers, regardless of which side they act for. Pope John Paul II may well have been correct to consider that the existence of civil lawyers able to advise individuals as to their rights to, and on, the civil dissolution of their marriage contributes to a greater readiness on the part of individuals to divorce. But the decision to divorce is made by the individual, not by the lawyer. And the conditions under which divorce is available are determined by the general law of the land and not by the cunning of the lawyer. To hold the lawyer culpable for presenting a case is simply to blame the messenger for the unwelcome message.

5.12 So much for lawyers. How did John Paul II apparently understand the position of judges in civil society attempting to be true to the teaching of the Church on the

indissolubility of marriage ? He seemed to recognise that their position is more complicated because, unlike lawyers in practice, judges cannot pick and choose the cases that will come before them. And once a case is before them, John Paul II accepted that the judges might be obliged to apply the law irrespective of their personal views as to its morality. Accordingly he concluded that:

> "for grave and proportional reasons they [civil judges in divorce cases] can act according to the traditional principles of material cooperation in evil. However, they *must* also find the effective means to favour marital unions, especially through a wisely conducted effort at conciliation."

5.13 What this seems to mean is that even although judges are required to apply laws which the late Pope considered to be unjust, they should do so in a manner which mitigated what he considered to be their unjust effects. He allowed that judges should apply the civil law, but observed that their application of this civil law should be tempered by Catholic moral teaching on the particular topic. In particular, in divorce cases, the Catholic judge is advised to find "means to favour marital unions, especially through a wisely conducted effort at conciliation".

Pope v. Justice ?

5.14 But what of other legal questions which a judge may be called upon to decide, on which the Church has also taken a view? If such issues come for decision before Catholic judges, are their decisions to be influenced or guided by official Catholic moral teaching? From the terms of these recent papal pronouncements, it would seem to be that the answer to that question must be "yes". By contrast, from the point of view of lawyers' professional duties, the answer to that same question must be "no". Pope John Paul II view seems equally clear that a judge's Catholicism *should* influence his legal judgment.

5.15 But if Catholic judges were to follow the late Pope's views, and stated that their understanding and application of the civil law would be tempered by specifically Catholic moral teaching, then objections could properly be taken and upheld against a Catholic judge sitting on a particular issue of moral controversy. Further, if a judge were to make explicit in his reasoning (as he is duty-bound to do) that he was influenced in coming to a particular decision by considerations derived from Catholic moral

[75] Independence and impartiality embody the essential characteristics of what it is to be a judge, whether acting as an "inquisitor"" on the European Continental model or as an "umpire" in the English-speaking legal world. The implications of the late Pope's direction to civil judges to temper their application of the law with Catholic principle would appear to run directly counter to this.

5.16 John Paul II's instruction – or observations - on the relationship between Catholic moral teaching and the practice of the law - placed conscientious Catholic judges in a dilemma. If they were now seek to apply Catholic teaching to the questions which came before them, their legal impartiality could properly be called into question. But if they refrained from applying Catholic teaching in their professional role, their loyalty and fidelity to the Church might be called into question. Either way, they appear to be compromised. The clearest resolution of this judicial dilemma would appear to be - as Scalia J. has suggested in relation to death penalty cases - would be for the Catholic judge to withdraw from acting in any legal matter in which the Church might be seen to have a prior view. That would indeed be paradoxical: the Catholic judge would be left with no option but to withdraw from acting in precisely those areas of law where the late Pope thought that Catholicism should make a difference.

5.17 But what is clear from the content and tenor of the remarks of both Pope John Paul II and Justice Scalia that each are in agreement that the teaching of the Catholic Church on moral issues is a relevant factor which Catholic judges might properly have regard to in making judicial decisions on legal questions. Scalia though it necessary publicly to "take on" the Pope because he clearly considered it of central importance that he be able to reconcile his understanding of the canon law requirements and moral obligations imposed on him as a Catholic with his practice as a judge. Justice Scalia's difference with the Pope appeared to be not whether the Church's moral teaching can properly affect the process of judicial decision-making, but rather over what the content of authentic Church teaching is. He wants his interpretation of the proper meaning to be

given to the US Constitution as permitting the death penalty to be at least one which traditional Catholic moral teaching will *allow* him to take. So he, like the Pope, seems to proceed on the basis of the possibility that there might be circumstances in which considerations derived from Catholic moral teaching may *forbid* him to reach a particular decision on the law. As one commentator has noted:

> "From the standpoint of Church teachings and in light of the example of Christ ... judges are essentially asked not to measure the justness of their rulings simply by civil legal norms, but instead to ask whether they are fulfilling their role as faithful Catholics in positions of social responsibility." [76]

5.18 Is this presentation and understanding of Catholic Church teaching correct ? And if it is correct, is it compatible with Catholic holding judicial office within civil society? The problem may lie in the Church's failure to recognise and value the autonomy and integrity of the legal systems within democratic political system, a problem which, it is suggested, is compounded by the official presentation and understanding of Catholic Church teaching on natural law.

6. Positive law v. Natural law

6.1 The philosophy of legal positivism proclaims, in essence, that whether a law is legally valid is a question which can and ought to be determined quite separately from the question as to what the law ought to be. Questions of legality – of legal obligation and legal validity - belong to a wholly distinct order of discourse from questions of morality. A law may be perfectly legally valid and binding in law even if unjust or immoral.

6.2 It is, of course, entirely consistent to be a legal positivist at the same time as being believer in the existence of objective moral standards. The central claim of "natural law" theory is that there are objectively knowable moral truths which are discernible by reason. Thus, in Catholic teaching the requirements of moral action in any particular situation are *not* of necessity to be founded on Church dogma, or based on specific divine revelation. The requirements of morality are, instead, to be established by reason. And to reason in human society is to engage in discourse, to argue, to debate, to consider. Natural law doctrine of itself may thus be thought to liberate. It frees up and obliges the religiously committed Catholic openly to debate - both within the Catholic Church and within the wider society outside the Church – and, ultimately, for that

individual to reach a decision and action on moral issues. As the Catholic theologian James Alison has written:

> "[N]atural law is the way verifiability challenges metaphysical *a prioris*, and this saves our Church from becoming a sacred sect, defined by bizarre and anti-rational taboos." [77]

6.3 Thus there seems no reason why such a belief in, and commitment to, natural law as a moral theory - structuring an approach to the proper understanding of specifically *moral* issues and discourse - should not quite easily and consistently be held at the same time as a legal positivist analysis of the law is maintained. [78] Legal positivism is not a disguised profession of ethical relativism. In fact, a perfectly coherent *moral* case may be made for the adoption of the analysis of legal positivism, because it is only once one is clear what the law is and what its demands are that one can then take a clear sighted moral decision about whether to follow and obey the law in any particular circumstances. As John Gardner writes:

> "Concerning legal norms the question always arises, as it does not concerning moral norms, of why I should obey them. Contrary to the impression given by its name, this is acknowledged and indeed emphasised in the natural law tradition. Natural law, in the tradition of that name, is not the same thing as human law. Natural law is the same thing as morality. It is the higher thing to which human law answers. We may regret that members of the tradition seem to feel a need to present morality as a kind of law, which it is not. For a start, morality is not a system (and is not made up of systems) and nor does it make claims, pursue aims, or have institutions or officials, all of which features are essential to the nature of law. Nevertheless, even as we resist the idea that morality is a kind of law, we should endorse the idea that morality, is entirely natural. It binds us by our nature as human beings, while law binds us, to the extent that it does, only by the grace of morality. ... I have warned against a possible inference from the view that the central case of law is the case of presumptively obligatory law to the view that law (more generally) is presumptively obligatory. This, I warned, is a fallacious move" [79]

6.4 But the prevailing position emanating from the Vatican seems to be one of unhappiness with legal or juridical positivism. [80] It seeks to tar the approach of legal positivism as being either committed to a form of moral relativism [81] (which is to say that there are no objective moral values). Alternatively, the Church suggests, the philosophy of legal positivism leads to (or, at least, provides no defence against) the absolutist claims of either openly totalitarian States that the will of the leader determines morality, [82] or of the (equally absolutist ?) claims made by some in democratic States that the will of the majority is conclusive of moral issues. [83] In rejecting this (self-created "straw man") version of legal positivism the Popes would seem, instead, to favour - as true Catholic teaching and therefore binding on Church adherents ? - a so-called "natural law" analysis which would seem to run the two issues of legality and morality together.

Thus the issue of whether the Church considers a particular law or legal rule to be morally acceptable (or rooted in the "natural law"[84]) is said to impact upon its validity and binding nature as a legal rule. Benedict XVI has stated:

> "In today's ethics and philosophy of Law, petitions of juridical positivism are widespread. As a result, legislation often becomes only a compromise between different interests: seeking to transform private interests or wishes into law that conflict with the duties deriving from social responsibility. In this situation it is opportune to recall that *every juridical methodology, be it on the local or international level, ultimately draws its legitimacy from its rooting in the natural law*, in the ethical message inscribed in the actual human being. Natural law is, definitively, the only valid bulwark against the arbitrary power or the deception of ideological manipulation. ... The law inscribed in our nature is the true guarantee offered to everyone in order to be able to live in freedom and to be respected in their own dignity." [85]

6.5 In similar Vatican "natural law" vein his predecessor in office, Pope John Paul II had claimed in *Evangelium Vitae*, that:

> "Laws which authorize and promote abortion and euthanasia are … radically opposed not only to the good of the individual but also to the common good; as such they are completely lacking *in authentic juridical validity*. … *[A] civil law authorizing abortion or euthanasia ceases by that very fact to be a true, morally binding civil law. Abortion and euthanasia are thus crimes which no human law can claim to legitimize*. There is no obligation in conscience to obey such laws; instead *there is a grave and clear obligation to oppose them by conscientious objection*." [86]

6.6 In his *Summa Theologiae* Thomas Aquinas states in considering the question as to whether human law binds an individual states:

> "Laws of this sort [whether running contrary to the common good, *ultra vires* the authority of the lawgiver, or disproportionate in their impact] are acts of violence rather than laws, as Augustine says (*De Libero Arbitrio* I, 5) 'a law that is unjust seems not to be a law'. Such laws do not bind in conscience, except perhaps to avoid scandal or disturbance." [87]

As Robert George notes:

> "[A]ccording to Aquinas, one may never obey a law requiring one to do something unjust or otherwise morally wrong. And sometimes disobedience is required to avoid causing (or contributing to) 'scandal or disturbance'." [88]

6.7 In considering specifically the issue of whether, in the light of the theory of natural law, a judge should always judge according to the law as enacted, Aquinas states:

> "[I]f the written law contains anything contrary to the natural right, it is unjust *and has no binding force*. For positive right has no place except where 'it matters not,' according to the natural right, 'whether a thing be done in one way or in another'; as stated above (57, 2, ad 2). Wherefore such documents are to be called, not laws, but rather corruptions of law, as stated above (Ia-IIae, 95, 2): and consequently *judgment should not be delivered according to them*.
>
> Even as unjust laws by their very nature are, either always or for the most part, contrary to the natural right, so too laws that are rightly established, fail in some cases, when if they were observed they would be contrary to the natural right. Wherefore *in such cases judgment*

should be delivered, not according to the letter of the law, but according to equity which the lawgiver has in view." [89]

6.8 On Aquinas' analysis, then, a judge has an over-riding obligation *not* to give judgment in accordance with otherwise validly passed enactments which are deemed to be substantively unjust or immoral. Separately, insofar as an *ex facie* just law would, in its application in a particularly case lead to injustice, then an equitable purposive interpretation should be preferred by the judge to a strict "black letter law" analysis which would result in substantive injustice. As John Finnis puts it, what Aquinas natural law analysis entails for judges is that:

> "Courts should not guide their adjudication by enactments (*scripturae leges*) which are contrary to natural law/right (*contra ius naturale*): IIaIIae q. 60 a. 5 ad 1. One may presume that e.g. judicial orders are legally valid and morally acceptable but if their invalidity is obvious they need not, and if their injustice obvious they should not, be obeyed: *IIaIIae* q. 64 a. 6 ad 3." [90]

But Professor Robert George does not to take account of - or may, perhaps, be unaware of - these passages from the *Summa Theologiae* in which, as we have, Aquinas deals specifically with the duties of judges. This may accordingly account for the inaccuracy of George's claim that:

> "*nothing* in Aquinas's legal theory or in the thought of modern natural law theorists, such as myself, suggests that the injustice of a law renders it something other than a law (or "legally binding") *for purposes of intra-systemic juristic analysis and argumentation*." [91]

6.9 Certainly in the face of any suggestion, instruction, recommendation or counsel to civil judges that they are obliged, in effect, to disapply otherwise validly enacted laws insofar as the laws are "unjust" would seem to make unsustainable the bald claim that "theologically serious [natural law] jurists are typically drawn from religious traditions that embrace an understanding of the rule of law, fundamental rights, representative democracy, civic republicanism, separation of powers and constitutional government that entails judicial modesty and judicial restraint". [92] Such a claim would *not* seem to be an accurate description of the natural law tradition, at least as drawn from and officially understood and expounded by the Catholic Church's *Magisterium*. As one leading natural law theorist has stated:

> "Not that Aquinas thinks the rule of law is ultimately a matter of institutional arrangements; rather it is a matter of doing what can be done to see that the State is ruled by 'reason i.e. by *law which is a prescription of reason* (*dictamen rarionis*) or by somebody who acts according to reason' (rather than by men, i.e. according to whim and passion'). [93]

6.10 Let is consider then laws which, on Aquinas' natural law analysis, would be said by him to run directly contrary to the requirements of reason and the common good by, for example:

(i) making provision for divorce and for the right to remarry; or

(ii) permitting abortion, even in limited circumstances; [94] or

(iii) regulating and authorizing the possibility of assisted suicide or voluntary euthanasia; or

(iv) allowing the death penalty to be imposed (at least where life imprisonment is an available option[95]); or

(v) giving legal recognition to same sex unions.

Such laws are, on this natural law analysis, not "laws properly so called". And the validity or enforceability of such laws would not be saved by any reference to the "rule of law" because for Aquinas (and for the Popes who rely upon his teaching) this means, in the final analysis, the rule of substantively "reasonable", "just", "moral" laws. It is not a reference to the rule of law as meaning respect for or the instantiation of procedural values of natural justice or representative democracy or "civic republicanism, separation of powers and constitutional government". Where, then, does that leave the conscientious Catholic judge in a constitutional democracy tasked with interpreting and applying such laws? Writing in 1949 to the first national convention of the Union of Italian Catholic jurists Pope Pius XII observed as follows:

> "The insoluble contrasts between the concept of man and law according to Christian principles … and that of juridical positivism can be a source of deep anxiety in professional life. We well know … how not infrequently in the soul of the Catholic jurist who wishes to remain faithful to his Christian concepts of law, there arise conflicts of conscience especially when he must apply a law which conscience itself condemns as unjust. Thanks be to God, in Italy your task is considerably lightened because of the fact that divorce – cause of so many interior worries to the judge who must apply law – has no legal place. In reality, however, since the end of the eighteenth century - especially in those regions where the persecution of the Church was severe – cases have been multiplied where Catholic judges have found themselves faced with the troublesome problem of the application of unjust laws." [96]

6.11 It would appear that according to the "fundamental norms" set out by Pius XII in this speech "to enlighten the conscience of Catholic jurists", Catholic judges are obliged to interpret and apply these laws "with a Catholic slant", even against the weight of established precedent, with a view to mitigating their tendency towards what the Church authorities characterize as "injustice".

6.12 The conscientious Catholic judge would seem also to be expected by the Church to temper such discretion as might be afforded him or her under the law to make it more difficult in cases before him or her to pronounce a degree of divorce. [97] or, say, to recognize the validity of a same sex union. By way of corollary, one assumes that a Catholic judge would be positively *encouraged* by Church teaching readily to grant a dissolution of any formally concluded same sex unions - and thereby restore the "natural order of justice". Presumably, too, the Church considers that a conscientious Catholic judge would be *obliged* to accept the pronouncement of the Congregation for the Doctrine of the Faith that "the principles of respect and non-discrimination cannot be invoked to support legal recognition of homosexual unions". [98] But is this a moral judgment, or a legal one on the part of the Holy Office ?

6.13 It would seem on this understanding of Catholic teaching that a conscientious Catholic judge must seek where possible to invalidate other "unjust laws" such as euthanasia statutes [99] or, arguably, to find ways to declare the imposition of the death penalty unconstitutional. Presumably the conscientious Catholic judge is also considered to be placed under some sort of obligation to try to find a regulation permitting abortion to be unlawful or a regulation restricting abortion to be constitutional. [100] Clearly the Supreme Court's refusal, failure or delay in overturning the 1972 case of *Roe v. Wade* directly impacts upon the availability of abortion in the United States far more than, say John Kerry's voting record in the US Senate. And just *five* individual Justices' votes US Supreme Court could result in the de-constitutionalisation of abortion and the restoration of its regulation to the legislatures of the individual States. Five of those Justices are now Catholic, the Chief Justice being Catholic along with four of his fellow justices. [101] These five Catholic justices have been said by Ronald Dworkin, in his fury at many of the decisions emanating from the first two years of the Roberts court, to constitute a "right wing phalanx … guided by no judicial or political principle at all, but only by partisan, cultural, and perhaps religious allegiance". [102]

6.14 For those reared in the more abstruse doctrines of Catholic moral theology the classic approach to the resolution of these practical issues arising from the natural law teaching that an unjust or immoral law is no law properly so called would be to proclaim as a first principle that the conscientious Catholic judge is always morally obliged to "refrain from any kind of formal cooperation in the … application of such gravely unjust laws

and, as far as possible, from material cooperation on the level of their application." [103] *Formal* co-operation (by which one intends to participate in the wrong-doing) is *never* permitted. *Material* co-operation (under which one foresees but does not wish the doing of the evil) *might* be permissible in the presence of duly proportionate reasons.[104]

6.15 So on this analysis, a judge who is (conscientiously) Catholic and because he is Catholic has to go through the following reasoning process [105] when considering the interpretation and application of any law or legal rule in a case coming before him or her:

(1) Is the legal rule in question one which the *Magisterium* teaches to be (gravely) "unjust" (for example in permitting or facilitating divorce, or abortion, or contraception, or euthanasia, or capital punishment, or the equal treatment of same sex couples to heterosexual/married couples) ?

(2) If so, can the conscientious Catholic judge apply the (gravely unjust) rule *without* appearing personally to endorse the rightness or justice of the unjust rule ("formal co-operation with evil") [106]

(3) If the conscientious Catholic judge can make plain his or her non-endorsement of the rule, can he or she interpret or apply it in a way which minimizes or negatives its intended (*ex hypothesi*, "unjust") effect, whether by construing the rule literally or liberally depending on the circumstances, if need be by ignoring the weight of past precedents ? [107]

(4) If not, and there is no room for manoeuvre in minimising the interpretation or negativing the application of the *ex hypothesi*, "unjust" rule, are there sufficient other circumstantial reasons related to the doing of justice which would outweigh the "injustice" of his or her applying the unjust rule in the particular case ("material co-operation with evil") [108]

(5) If not, then he or she need at least recuse himself or herself from the particular case in order to avoid being an agent of injustice, [109] and leave it to a non-Catholic to interpret and apply the law in this case. [110]

6.16 But is this really the kind of (in the proper sense of word casuistical) moral analysis really to be expected or permitted of any civil judge in a secular legal system? And is this kind of moral reasoning to be expected prior to or in addition to (or, perhaps, instead of) the classic intra-systemic legal reasoning by the judge in any particular case ? A whole series of problems seem to be raised

6.17 For example, in relation to Step 2, if the conscientious Catholic judge is expected by the Church also clearly and publicly to express his or her personal moral opposition to the "unjust law" before going on to interpret and apply it, as far as possible in a "Catholic" way would not any such statement gave rise to a reasonable perception of prejudice – prior judgment or bias on the part of the Catholic judge such as would oblige him or her to recuse themselves from the case? And in any case would not such personal distancing from the application and interpretation of the unjust law not be precisely the sort of distinction between a politician's private views and his public duties – which was apparently relied upon by Senator John Kerry when questioned as to his voting record on abortion – with the Congregation for the Doctrine of the Faith condemned when it stated that:

> "The lay Catholic's duty to be morally coherent, found within one's conscience, … is one and indivisible. *'There cannot be two parallel lives in their existence: on the one hand, the so-called 'spiritual life', with its values and demands; and on the other, the so-called 'secular' life, that is, life in a family, at work, in social responsibilities, in the responsibilities of public life and in culture.* […] (John Paul II, Apostolic Exhortation *Christifideles laici,* 59.)' Living and acting in conformity with one's own conscience on questions of politics is not slavish acceptance of positions alien to politics or some kind of confessionalism, but rather the way in which Christians offer their concrete contribution so that, through political life, society will become more just and more consistent with the dignity of the human person." [111]

6.18 And in relation to Step 4 is there not a problem with the fact that the interpretation of the law is affected not by purely legal considerations but by religious (specifically Catholic) conceptions of justice ? Does this not rather look the application of a "religious test" to the proper understanding of the law – and by implication the Constitution ? Given that Article VI of the US Constitutions provides that "no religious test shall ever be required as a qualification to any Office or public Trust under the United States" might it not be argued that those holding any Office or public Trust under the United States – for example Article III judges - are obliged in turn *not* to apply their own personal religious tests in performing their duties under the Constitution ?

7. Can Catholic canon law be used to coerce the civil judge ?

7.1 There does seem to me to exist a real dilemma or problem in the way in which Catholic teaching on "the moral obligations of Catholic civil judges" is officially understood and presented in that it insists that primacy always be given to those moral obligations over and against the judges' own constitutional or legal duties.

7.2 The terms of the judicial oath for Article III US judges are provided for in 28 U.S.C. § 453 (2000) as follows:

> "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.'"

7.3 But following the respective analyses of Pius XII, John Paul II and of Benedict XVI as to the requirements of "justice" and "equal right" a judge who reached judicial decisions which protected or promoted, for example abortion rights or same-sex marriage would not, in fact, be administering "justice" or doing "equal right". As we have seen the Congregation of the Doctrine of the Faith has stated unequivocally that "the principles of respect and non-discrimination cannot be invoked to support legal recognition of homosexual unions".

7.4 Thus if one takes those Papal claims seriously the very judicial oath would seem, on its face, to be permeable to considerations derived from the social teaching of the Catholic Church. And if the Constitution of the United States and laws "properly so called" are understood as being instruments intended to achieve "justice" rather than "injustice" then the way would appear to be open to specifically *Catholic* interpretation of those laws and that constitution by those who hold themselves out to be both faithful (conformist) Catholics and faithful judges. Thus Cardinal Levada, formerly archbishop of San Francisco and now the former Cardinal Ratzinger's successor as head of the Vatican Congregation on the Doctrine of the Faith, has asserted that:

> "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. …. Supreme Court decisions are not infrequently changed or reversed over time. The *Dred Scott* decision on slavery is perhaps the most cited case in point. The Supreme Court's judgment

about the application of the Constitution should also be guided by principles of the moral law."[112]

7.5 The Cardinal displays a worrying lack of understanding of the constitutional history of the United States in supposing that the *Dred Scott* decision was overturned by simply judicial fiat, as well as a form of historical amnesia in his failure to acknowledge the slaves were held and owned by Catholic institutions based in the South right up to the Civil War (on the basis that slavery was not at that time considered by the official teaching of the Catholic Church to be "intrinsically evil". [113]) Instead, of course, *Dred Scott* was overturned not by the court but by the terms of the 13th and 14th amendments to the United State constitutions passed in 1868 the wake of the American Civil War. But if, on Cardinal Levada's understanding, the votes of the Supreme Court Justices are to be determined not (just) by the terms of law or the intention of the Framers of the constitution, but (also) by wholly external considerations such as the requirements of the religion of the particular judge (as told to them by their bishops) is there not a problem about separation of powers and of the separation between Church and State ?

7.6 One suspects that any open and explicit public attempt by Catholic bishops to dictate to Catholic judges would result in a backlash against religious interference in the affairs of the State. But it should be borne in mind that Canonical penalties such as the refusal to admit to communion can only be imposed against those "who obstinately preserve in their sin" [114] or whose actions are "gravely imputable by reason of malice or negligence".[115] The public rebuke of a public official for failing in his Catholic moral duty is, under the Catholic Church's code of Canon Law very much a remedy of last resort. [116] The remedy of *publicizing* the instruction comes into play only after the primary remedy of private warning or admonition to the individual to follow Catholic teaching [117] (as understood by the bishops) has been tried and has failed. [118]

7.7 Assuming that private rebukes, warning and other attempts at fraternal correction of any "erring judges" on the US Supreme Court has not been essayed, it is not immediately clear why - for other than prudential reasons - the bishops should *not* be seeking to assert their ecclesiastical authority (ultimately publicly) over those of their flock who hold judicial office, just as they have sought to assert it over those who or seek executive or legislative office, and over those citizens who might vote them into such office. [119]

7.8 Other bishops have. In May 2006 the Constitutional Court of Colombia found that the Colombian constitution gave women the right lawfully to obtain an abortion where their pregnancy was a result of rape or incest or where the unborn child was malformed such as to be incapable of independent life if born. [120] The immediate response to this decision by Cardinal Pedro Rubiano Saenz, Archbishop of Bogotá was to invoke Canon 1398 of the Code of Canon Law against the judges who formed the 5-3 majority of the Constitutional Court in this decision. Canon 1398 provides that a person who procures a completed abortion incurs a *latae sententiae* (automatic) excommunication. [121] In September 2006 the Colombian Catholic Bishops Conference issued a collective statement by which they sought to "call the attention of baptized Catholics to the gravity of abortion and prevent the crime from being committed" and in which they deplored the "abortionist mentality" revealed in the decision of the Constitutional Court, stating that "civil law can never replace conscience or dictate norms which overstep the duty to guarantee the common good by means of recognition and protection of the basic rights of the people". The bishops confirmed that the penalty of automatic excommunication applied to all whose actions knowingly facilitated the carrying out of abortion. Their comments appear to have been directed at the judiciary.

7.9 Thus it would seem that if Justice Scalia [122] or any of his fellow Catholic Supreme Court justices were specifically to vote against an attempt to invalidate a duly democratically passed (State *or* Federal) law which permitted abortion (whether on demand or in more limited or regulated circumstances) they would, in the judgment of the Catholic bishops of Colombia at least, incur the automatic penalty of excommunication from the Catholic Church. The alternative might be for those Justices who consider themselves conscientious conformist Catholics simply to recuse themselves from hearing abortion cases thereby, in its present Catholic majority make-up, rendering the Supreme Court always non-quorate ever to re-consider or over-rule *Roe v. Wade*. This is not, perhaps, a result envisaged by those Republicans Presidents who nominated these individuals to the Court on the grounds that they seemed to be "sound" on "values issues".

8. Is an unjust law really *no* law (properly so called) ?

8.1 The problem ultimately seems to be this. The supposed "traditional" Catholic natural law teaching on the non-binding nature of an unjust law is quite simply too blunt an instrument to be able to take proper account of the duties owed by a *judge* within the legal system to uphold the integrity of that legal system in its entirety. As has been observed, "in law context is everything" [123] and a passing dictum of Saint Augustine that "an unjust law would seem not to be a law" has been consistently taken out of context (notably by Thomas Aquinas, and in subsequent Papal pronouncements) and so has been misunderstood and misrepresented.

8.2 The phrase "an unjust law would seem not to be a law" occurs in the Chapter 5 of Book 1 of Augustine's *De libero arbitrio voluntatis* (On the free choice of the will) which was composed by Augustine over the last two decades of the fourth century CE. But a few pages on - in chapter 6 of the same Book 1 of the work - Augustine speaks of a law which "is unjust and [therefore] *ought not* to be in force". [124] This, if anything, supports a legal positivist analysis that the fact a law is in force is one thing, but whether it ought to be in force is another. The reason why apparently contradictory positions would seem to be taken by Augustine on this point in the course of a few pages is that *De libero arbitrio* was written in the form of an imagined dialogue or reconstructed discussion between Augustine and his friend Evodius concerned with the problem of evil. Statements made in the course of the debate do not, then, necessarily represent the final considered views or the interlocutors, but may be throwaway remarks, or said in irony, or put forward to provoke further thought, or to elicit a clarifying response or to persuade. The literary form is dialectical, and so a statement made may subsequently be contradicted by another – whether from the same speaker or his interlocutor - and the two apparently contradictory observations ultimately brought together in a synthesis. Augustine, it must also be borne in mind, was trained in rhetoric and earned his living (in the early pre-ordination part of his career) teaching students the skills of forensic advocacy, that is to say, how to argue in law courts. The work, then, proceeds like a legal argument with positions put forward, contradicted and ultimately refined.

8.3 Thus in discussing the circumstances in which it might be said *not* to be morally blameworthy to kill another, Augustine earlier suggest in argument that the law might be

wrong to treat as a murderer a slave who kills his master who had threatened to torture him (as was the slave-owner's right within the Roman law pertaining to slavery). [125] But Augustine does not suggest that such a law (condemning the slave as a murderer) is not, in fact, the law. Rather his point is that it seems to be inconsistent with other laws "which grant a traveler the power to kill a highway robber so that he himself may not be killed; or which grants a man or woman the right to slay, if they can, an assailant before he can do violence". And of these other laws he says "We shall not, shall we, dare say that these laws are unjust – or rather are not laws at all, for I think that a law that is not just is not a law." [126] But the final section of this discussion then concludes with Augustine accepting Evodius' claim that the law should *not* be expected to punish all things which might be said to be (morally) wrong: [127]

> "Evodius: The law of the people deals with acts that it must punish in order to keep peace among ignorant men, insofar as deeds can be governed by man; these other sins have other suitable punishments, from which I think only wisdom can free us.
>
> Augustine: I praise and approve this distinction that you have made. *It is incomplete and imperfect*; nevertheless it is full of faith and aims at the sublime. The law which is made to govern States seems to you to make many concessions and to leave unpunished things which are avenged nonetheless by divine providence – and rightly so. Bu because it does not do all things, it does not thereby follow that what it does do is to be condemned." [128]

8.4 So the discussion of the relationship between law and justice is provisional, incomplete and imperfect. It is *not* Augustine's definitive last word on the issue. Unfortunately Catholic tradition from Aquinas on seems to have treated it as such. In any event, the legal system of the fifth century CE later Roman Empire within which Saint Augustine of Hippo is working when he apparently asserts that "an unjust law would seem not to be a law" is one where there are no proper representative legislative assemblies for the Empire as a whole (legislation in this period being proclaimed simply by the edict or rescript of the Emperor) and which does not conceive of the separation of powers (a Roman Governor is also the chief civil judge for a Province and the Emperor the Supreme Judge of the Empire). It is a legal system where appointment to judicial office is not based on any merit or legal acumen or ability. [129] It is a system where there appears to be one law for the rich and another for the poor and where justice grinds slowly, if at all.. [130] It is a system where on Augustine's own account, torture is routinely used as a form of evidence gathering from innocent witnesses,[131] and in which draconian and excessive punishments, including various forms of torturing to death, are routinely pronounced and readily carried out. [132] Kevin Uhalde notes:

> "As the orator Themistius put it to Theodosius I the Great, an emperor was at one ad the same time 'the animate law' and a 'refuge' from its severity. He revealed himself to be the living law whenever he issued a rescript or edict; he proved himself to be a refuge from the law's severity whenever he exercised clemency. It was a simple matter to show mercy towards the guilty, towards those whom the machinery of justice had captured; emperors forgave convicted criminals on an almost regular basis. I was more difficult to provide refuge for the innocent who were the potential victims of justice and the ones who most deserved a refuge. Without diligent and accurate administration the rules of process might injure the people they were meant to protect …. amplif[ying] the dissonance between the promise of justice and the reality of its execution." [133]

8.5 Now while there may be clear instances in the modern age – the German legal system as perverted by Nazism is the prime exemplar – of *whole* legal systems being immoral and hence deserving of no loyalty or allegiance even from those holding office within it, in contemporary Western democracies the legal systems which exist may be properly be described as more or less good. Insofar as they contain laws which are held by some to be unjust, then there are mechanisms for change within the system, for new laws to be passed and old laws to be repealed. Democracies contain within them precisely this kind of responsiveness to the views and opinions of those outside government – the wielding of power and the making of laws in a democracy are activities which are ultimately answerable and accountable to the people. The natural law theory as expounded by the Catholic hierarchy seems unable properly to account for these aspects within a democracy which renders their older analysis – of unjust individual laws simply failing in their validity – one which is out of date and not true to reality and the experience of all who hold office and are subject to the legal systems of democratic societies. Catholic political philosophy needs a time of renewal properly to begin to take account of the phenomenon of democracy and – its related principle – the separation of powers. For as Professor Robert George has correctly observed:

> "Fidelity to the rule of law imposes on public officials in a reasonably just regime (that is a regime that it would be wrong for judges to attempt to subvert) a duty in justice to respect the constitutional limits of their own authority." [134]

8.6 The only problem is that the Magisterial teaching of the Catholic Church on natural law does not in fact support that proposition. This becomes clearer when one considers the first of the "fundamental norms … to enlighten the conscience of Catholic jurists" as formulated by Pius XII in his 1949 Address to the Union of Italian Catholic Jurists seems to wholly misunderstand, or misrepresent, the principle of separation of powers in a modern constitutional democracy. He states:

> "[A] judge cannot simply throw responsibility for his decision from his own shoulders, causing it to fall on the law and its authors. Undoubtedly the authors are principally responsible for the effects of such a law. But the *judge who applies it to a particular case by his sentence is a joint cause and thus jointly responsible for these effects*." [135]

8.7 But in a constitutional democracy it is precisely the duty of the judge to apply the laws duly enacted in accordance with the rules, principles and values of the constitution under which they laws have been passed. For a judge to decided not to apply or to re-interpret a law in a manner which is determined not by the intra-systemic rules and principles governing legal interpretation, but by extraneous considerations – such as his own or his Church's moral values – would be a usurpation of his or her office.

9. The (secular) values of civil democratic society

9.1 Further, and contrary to the view expressed in many recent Church documents, democracies *do* have values, procedural as well as substantive. The values that Western democratic States proclaim (and seek to instantiate) are those of liberty, equality, tolerance, pluralism, and respect for human rights and the structures of the rule of law. In particular, the moral vision implicit in the Western democratic State is one based on the following propositions:

(i) that all individuals have intrinsic worth and value;

(ii) that respect for this intrinsic worth can be translated into statements of fundamental constitutional rights;

(iii) that others' respect for the individual's rights entails correlative obligations placed upon that individual - that of respecting the rights of other individuals as equal to one's own and of respecting the interest of the community as a whole;

(iv) that the interests of the community as a whole are to be determined by a democratic process, under which the majority's will prevails - subject always to the duty of the majority to give due respect to others' fundamental rights;

(v) that the creation and maintenance of a balance of mutual respect for the rights of individuals and the interests of the community, requires that institutions for open dialogue and discussion flourish – hence the importance accorded to the principle of freedom of speech, open and honest Parliamentary or

Congressional debate, and the flow of information and comments through the press, broadcasting, and the internet;

(vi) that the avoidance of tyranny and abuse of power by (or in the name of) the majority, and the due protection of the fundamental rights of minorities and individuals entails that there should be independent and impartial courts [136] whose judgments are to be respected and accepted by all parties before them, most obviously by those entrusted with political power;

(vii) that for the institutions of power (executive, legislative and judicial) to be able to work together in maintain the structures of democratic society - in which the majority leads but does not dominate or exploit the minority - there has to be an attitude of humility and contingency of views, an acceptance that one might be wrong and a consequent readiness to be open to persuasion of the rightness of other views;

(viii) that all those who participate within civil society – and most clearly those who hold public office – do so in good faith and share those values of respect for the individual, tolerance of difference, equality of treatment, and willingness to listen upon which all the civil institutions of the society are based;

(ix) that the laws duly passed under the democratic deliberative process and which have been duly found to be in accordance with the constitution and respect for fundamental rights be respected and obeyed by all parties within society, subject always to the right to continue to press for constitutionally mandated change in such laws;

(x) that, the possibility is recognized that, in certain rare and extreme cases, an individual may feel impelled, as a matter of conscience, to break a duly enacted law of the State in order to prevent further illegal action[137] but only where –

(a) the action which is sought to prevent is in fact illegal, whether under domestic or applicable international (humanitarian) law;

(b) the individual's action is necessary in the senses that there was no legal reasonable alternative is in fact available to the actor (for example because the relevant authorities have refused or refrained from enforcing the law in relation to the illegal act)

(c) that the individual actor could reasonably and properly expect that the actions taken would be effective in impeding the illegal act;

(d) that the individual's actions are marked by a "fidelity to legal values", that is to say that it is proportionate, involves no possibility of harm or violence to individuals, [138] and no attempt is made to avoid detection in the doing of the act

9.2 On the basis of these propositions, civil democratic society does *not* differ radically from the institutional Church on the question of the substantive fundamental values which it seeks to promote: human rights discourse is common to both communities. [139] And in both cases it is also recognized that one of the purposes of reference to human rights is precisely to protect minorities against the possible tyranny of the majority [140]

9.3 The difference between civil democratic society and the Church lies rather in two aspects. Defined negatively, it might be said that in comparison to the Church, civil democratic society shows a lack of certainty or finality in the judgments made on how those substantive values are to be realized, and on the requirements of the common good. Defined positively, civil democratic society differs from the Church in its openness to the possibility of alternative views of the good than those which currently hold sway, and in its procedures for general consideration and popular participation in the process of deliberation and decision on how we might achieve the common good.

9.4 Civil society – in contrast, it would seem, to the Church - admits its *fallibility* in getting the right answer, but it has procedures and institutions to allow for continued debate, and for the possibility of change in the rules and the law in this search for the right answer. Such an admission of fallibility does not mean, as is sometimes charged, that a democratic society is therefore committed to "ethical relativism". Ethical relativism is an assertion that there is no right answer. The structures of a democratic civil society are precisely to allow for the continued search for the right answer. [141] What the democratic State bring into the realization of those values (which the Church does not, and hence the apparent mismatch in rhetoric and practice between the two discourses) is the idea of due process, of the rule of law, the procedural rights of the defence and the like.

9.5 A civil democratic society is one which allows that where a decision has to be taken on such issues, the decision is taken on the basis of the vote of the majority of the people

(or their representatives). A civil democratic society will also be a pluralist society: that is to say one which allows for the possibility of individuals holding different views of questions of political and moral importance and having the right and opportunity to express, publicise and proselytise for those views – whether it be fox hunting or abortion regulation. A civil democratic society will also be a liberal society, that is to say one which aspires or seeks to allow individuals the greatest degree of freedom to express those views, consistent with due respect for others to express opposing views.

9.6 An essential part of what it is to hold public office in a democracy is a quality or disposition of "open-mindedness". Again, just to be clear, that is to not to say that one has to be committed to a form of relativism – that there are no objective truths – but that one is open to persuasion that the truths one holds and perceives *may* not be the definitive or last word. This is most clearly an essential quality for those acting as judges within civil society – without an ability for detachment from one's initial views, a capacity to suspend one's immediate judgment on an issue and be willing to listen to argument – there can be no true act of judging impartially. But even among members of the legislature and the executive – although sometime obscured by the party whip system - the ideal is that they too should be independently minded, willing to hear other voices and having heard them, to deliberate and come to the their decision on the requirements of the common good

9.7 Fundamental rights within civil democratic society are based on the recognition of the value of the individual human being and on the value of democratic process and the maintenance of dialogue and free expression as the only means toward the resolution of moral and political disputes. From the viewpoint of civil democratic society, it makes no sense to seek to disentangle ideas of substantive fundamental constitutional rights from the deliberative and procedural matrix in which they have been engendered.

9.8 Dialogue within a liberal pluralist democracy involves a willingness to listen as well as a readiness to speak and an acceptance of the existence of different and dissenting voices. It involves, too, an acknowledgment of the value of the procedures existing within society for the resolution of differences on questions touching on the common good – whether this be by legislation or litigation. It necessitates respect for the "rule of

law". Any Church teaching on the proper relationship between the civil law and the "moral law" needs to take account of the fact that in the context of the democratic State, the legitimacy of each individual law comes not from the end which it achieves, but from the fact that it has passed through the democratic process and has been found, by the institutions of the State duly charged with this task, to be in conformity with respect for the fundamental rights of those falling within the care of the State.

9.9 But laws in the democratic State are *not* fixed and final, and its governments are not eternal. Precisely because the ideal which democracy represents is that the law continues to be responsive to and reflective of the community, there is provision for lawful change. Lawful change is brought about by using the mechanisms of a democratic society which allow for: campaigns to be mounted; petitions gathered; public discussions initiated in the press and the broadcasting media; Parliamentary and Congressional debates sponsored; and Ministers and members of the executive and the legislature lobbied all with a view to bringing change in the law, the better for it to reflect the common good and to instantiate justice. All of these are activities in which the Church may legitimately take part.

9.10 In a democracy, the approach taken is that those who object to particular laws should campaign for their amendment or repeal by the democratic legislature in accordance with the values of the constitution. But simply to claim that there is always and everywhere a right (indeed a duty) on all Catholic immediately to disobey (or at least subvert) the laws which the Church considers to contravene "natural law" is to threaten the integrity of the whole legal system which sustains the democratic State, and to seek to bring it down in anarchy and with it the very institutions which exist within a democracy to facilitate dialogue and change. [142]

9.11 And it is just not good enough for any implicit comparison to be made between the legal and political systems which currently exist within Western democracies with that which existed in Nazi Germany. [143] As we already mentioned, the case of the German legal system from 1933 to 1945 is one of a system which was systematically corrupted in its subordination to the Nazi tyranny such that all those who participated within it (and more generally in public life) were tainted by its failings. It became truly a system of and only of State oppression, such that it became no longer worthy of the name of a

"legal system" because in no sense could it be said to embody or seek the common good. The only moral response in relation to such wholesale corruption was for the just to withdraw from any participation in it and, indeed, to seek to overthrow the regime – by "unlawful" or "revolutionary" means if need be – which sustained it.

9.12 But the proper response of the Church which continues to accept the overall legitimacy of the legal systems of Western democracies cannot be to call for revolt against the system as a whole, [144] or for Catholic judges within it effectively to undermine fundamental principles of that system (such as the separation of powers [145]) but instead to call for change in specific aspects and laws thereof. And if such change is indeed to be legitimate within the terms of the legal system it has to be one mandated by the accepted democratic and constitutional process. Accordingly, in order to promote such change it is necessary, to engage in debate within the market place of ideas.

9.13 Thus is a model which - unlike the classic natural law model expounded heretofore by the hierarchy – would allow members of the Church to participate fully within the public life of civil society. But crucially insofar as members of the Church do so participate, it also involves the institutional Church imposing on itself a self-denying ordinance – out of respect for the web of obligations involved in civil society and the duties of public office – to refrain from instructing its members as to how specifically they are to exercise their responsibilities as voters or to carry out their duties as public office holders within civil society. Again *Gaudium et Spes* states:

> "All citizens, therefore, should be mindful of the right and also the duty to use their *free* vote to further the common good. *The Church praises and esteems the work of those who for the good of men devote themselves to the service of the State and take on the burdens of this office.* If the *citizens' responsible co-operation is to produce the good results which may be expected in the normal course of political life,* there must be a statute of positive law providing for a suitable division of the functions and bodies of authority and an efficient and *independent* system for the protection of rights." [146]

10. Conclusion

10.1 The bishops (and all members of the Catholic Church exercising the office of teacher) may seek to articulate the principles of ethics and justice and the requirements of the common good, but it would be illicit for those holding office within the Church to purport to *direct* those holding office within civil society how to do their jobs. The duty of public office holders is to uphold the Constitution under which they hold office, not to

undermine that office by seeking to further the agenda of another body or to promote values which are not compatible with the civil society in which they hold office.

10.2 The point which the more recent Papal teaching on natural law has ignored is this: those who participate in the system of civil law, whether as judges or lawyers, have a (legal) duty to be true to the values embodied within that system. The duty of all lawyers or judges, whether Catholic or otherwise, is to ensure that the law is applied impartially without fear or favour. The civil law is not to be applied instrumentally to further some other external system of values, however worthy, such as for example those set out in official Catholic moral teaching, because to do so is to subvert the very integrity of the legal system which lawyers and judges have sworn to uphold. The teaching of the Church must allow for the autonomy of the legal system within civil society, just as it must respect the autonomy of the political sphere.

10.3 We have the privilege of living and working in established democratic, liberal and pluralist polities. The Church cannot require that some form of theocracy be substituted for it, or insinuated within it. Insofar as the Church finds the civil law wanting in any particular respect, then it may properly petition and press for that law to be changed by the respective national legislatures. Otherwise the Church should respect the integrity of the civil legal system, and those who work within it, to protect the values already within that system and which are common to civil society as a whole, rather than simply one Christian confession within it. Those who practice in the law are not bereft, as individuals, of personal moral views. But when acting in their professional capacity, whether as lawyers or judges, their fundamental duty is to uphold the law and legal values. The law does not invariably produce a just result, but justice cannot be achieved except through law. For justice to be done according to law, lawyers are obliged to keep separate their personal views of what the law ought to be from their professional view as to what the law is. The Church teaching to the legal profession and judiciary seems to have failed to take this into account.

10.4 It is suggested that all that the Church can properly expect from its members participating in the public life of the polity is that they will carry out their duties in accordance with their conscience[147] and with the civil law. As the then Father Joseph

Ratzinger (now Pope Benedict XVI) observed in his commentary on Article 16 of *Gaudium et Spes*: [148]

> "[C]onscience represents the inner complement and limit of Church principle. Over the Pope as the expression of the binding claim of ecclesiastical authority, there still stands one's own conscience, *which must be obeyed before all else, even if necessary against the requirements of ecclesiastical authority*. This emphasis on the individual, whose conscience confronts him with a supreme and ultimate tribunal, and one in which the last resort is beyond the claim of external social groups, *even of the official Church, also establishes a principle in opposition to increasing totalitarianism*.
> […]
> Conscience is made the principle of objectivity, in the conviction that careful attention to its claim discloses the fundamental common values of human existence.
> […]
> Above all, however, conscience is presented as the meeting point and common ground of Christians and non-Christians and consequently as the real hinge on which dialogue turns. *Fidelity to conscience unites Christians and non-Christians and permits them to work together to solve the moral tasks of mankind, just as it compels them both to humble and open inquiry into the truth*." [149]

10.5 To be a conscientious *and* Catholic judge on this model would be to impose on oneself a self-denying ordinance – to separate one's religiously determined beliefs from the proper requirements of the law and, in effect, to set up an internal psychological wall of separation between Church and Law with a view to doing one's best to decide cases *in accordance with the law*. [150] Frankfurter J. observed:

> "[A]s judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations. ... As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge ... is not that of an ordinary person. It can never be emphasised too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench" [151]

10.6 Justice can be achieved only through and because of the law the law, not despite it. It is not without interest that a number of serving Catholic judges who have expressed themselves on this matter have made clear their unequivocal commitment – even in the face of contrary Church teaching – to the primacy of the Constitution over the law and natural law teaching of the Church. Thus Judge William Pryor has stated:

> "But what if the law of the sovereign conflicts with natural law ? Does not the Catholic Church, based on the reasoning of Saint Augustine and Saint Thomas Aquinas teach that a violation of natural law cannot be called properly 'law' ? My answer is that a federal judge has no authority to use natural law as a way to subvert the clear commands of the positive law."[152]

Judge Diarmuid F. O'Scannlain has observed:

> "There are many areas of law, as we all know, that fall short of a perfect vision of justice within the Catholic tradition. Let us assume for the sake of argument that a Catholic feels passionately about the rights of the unborn or of immigrants, and that our nation's laws are unjust to both. There are many commendable jobs a person might pursue to vindicate those positions. But I respectfully suggest that the job of a federal circuit judge is not high on the list. A person wanting the sort of job that can improve the justice of our laws ought to be running for office, writing for a think tank, or working in some sort of advocacy role. Accepting a commission to the federal bench means agreeing to enforce the laws as they are, not as one would have them be."[153]

While Justice John Roberts affirmed in his confirmation hearings before the Senate that:

> "[M]y faith and my religious beliefs do not play a role in 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." [154]

And Justice Samuel Alito told the Senate in his confirmation hearings that:

> "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." [155]

10.7 But in order for these judges to be able to state their commitment to upholding the Constitution they have to be non-conformist Catholics – that is to say, Catholics who do publicly dissent from Church teaching and who do not consider themselves to have the right, *as Catholics*, so to do. Professor Robert George has suggested that, at least his version of natural law theory is, in fact, consistent with such views of judicial self-restraint, the strict separation of powers and the primacy of the oath to uphold the Constitution and laws made thereunder, claiming:

> "[Doesn't natural law claim that the judge's duty is to give judgment according to the natural law in cases of conflict between natural law and positive law ? No. *In my opinion* the question of how much *legislative authority* the judge has to translate 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 in practice) as to how much *legislative authority* they confer upon judges. … If [Justice Scalia's] views about judging make him a positivist his positivism does not, *I think*, place him in conflict with the [Catholic] Church's teachings about natural law." [156]

10.8 Now there is always a danger for those writing in the area of natural law theory to become more Catholic than the Pope, but it does not seem to me that Professor Robert George's re-presentation of his natural law thinking is in fact an accurate representation of the thought of either Popes Benedict XVI or John Paul II or Pius XII (to name but three) or Thomas Aquinas. [157] These are all quite clear that the over-riding duty is for a Catholic judge to seek to apply the moral law over and against the positive law where

the two come into conflict. This would apply even to the constitutional separation of powers rules of positive law. If such a procedural constitutional principle of positive law means that judges still consider themselves obliged to uphold and apply what are - on the Papal/Thomist analysis - in fact substantively unjust (evil) laws, then they would hold that that very procedural law – or constitutional theory - must be disapplied or abandoned. Thus if Justice Scalia's much-vaunted originalist approach to the interpretation of the United States constitution would require him to vote against an argument seeking to invalidate as unconstitutional a duly enacted democratically passed State permitting, say, abortion on demand then, on Papal natural law theory, he would be required to abandon that originalist theory in favour of a more nuanced developmental view of proper approach to the interpretation of the Constitution, [158] albeit one that he would otherwise characterize as

> "the conventional fallacy that the Constitution is a "living document" - that is, a text that means from age to age whatever a text that means from age to age whatever the society (or perhaps the Court) thinks it ought to mean"

10.9 On Scalia's characterization of the living Constitution theory if a judge considers that a law or penalty is "immoral, then it is (hey, presto!) automatically unconstitutional". [159] But just as following superior orders is not regarded, post-Nuremberg, as a lawful or valid excuse to the continued perpetration of wrong-doing or injustice, [160] neither on this Papal understanding of natural law is the following of a particular constitutional theory of interpretation, particularly where the following of such a constitutional theory (originalism) is nowhere explicitly mandated within the Constitutional text and is one on which reasonable judges would seem to differ. [161]

10.10 In any event, the formulation by Professor George refers only to the case of a judge having formal "legislative authority" under a constitution. That is not the issue. The requirement placed on a judge to apply and interpret the positive law in accordance with the requirements of natural law applies to all cases that are before him or her. Robert George may, for his own reasons, wish to continue to call his analysis a "natural law theory" [162] (though apparently indistinguishable in this matter from legal positivism), but whatever it is, it is not the legal theory currently espoused by the *Magisterium* of the Catholic Church which Robert George – in his *persona* as amateur theologian – would

hold is binding on those who would continue to call themselves Catholic. A professional Catholic theologian has commented on Robert George's position thus:

> "I find it questionable to hold that there is no natural law warrant for judges especially to employ insights about substantive questions of justice *to overturn legislation that violates natural law principles*. Authority it seems to me, in any of its forms, is a matter for witnessing to truths that are earlier, higher or logically prior to itself and using powers responsibly for that purpose. Civil authority will inevitably bring itself into contempt by excessively activist judicial legislation but civil authority can also fail by defect. It can do so for instance in the scenario of judges who will to assert themselves to halt injustice that gets embedded in legislation whether by the will of an activist legislature (*sic*) or by a legislature whipped into action by a media-induced frenzy in the populace. …. Put another way I think we dare not restrict questions of substantive justice known by way of natural law to be restricted to the realm of politics and legislation – we dare not do so because of what natural law requires. *We must rather insist that the natural law requires that all three powers of government (whether these three powers are separated as in our system or combined as in some other form of government) need to call to mind and to act in accordance with substantive justice and not just procedural fairness. Professor George has argued that there is nothing about natural law that gives this role to the judicial branch as long as some branch of government has the role. Yet I do not see that natural law allows any branch (within a polity whose powers are separated into distinct branches) to be excused this function*." [163]

10.11 In fact the public statements of Judge William Pryor, Judge Diarmuid O'Scannlain, Judge John Noonan, as well as various Catholic Supreme Court justice denying that in their judicial decision-making considerations of natural law might impact upon their understanding and application of provisions of the positive law or in their interpretation of the Constitution shows that they all reject this Church teaching. [164] They are all, then, non-conformist Catholics holding to and acting on the basis that the principle of freedom of conscience proclaimed by the Catholic Church is not limited to those outside the Church, but allows for faithful Catholics within the Church to critically engage with the tradition and teaching of the Church and ultimately come to an informed reasoned view on crucial issues which are then acted upon in good conscience. [165]

10.12 Catholic moral teaching has always held that individuals must be accorded the right and freedom to act in accordance with the dictates of their conscience and to be free to make a positive decision to do good and avoid evil. [166] The whole history of salvation is one predicated on free will and the individual making a choice. The Church has also taught that individuals have an obligation to seek to inform their consciences as to what is objectively the right thing to do. [167] But the debate over the place of individual conscience in determining moral action seems to be be-devilled by a failure to make a distinction between the undoubted duty to *inform* one's conscience, and the much more problematic question of whether an individual can properly be required to *conform* his

conscience and actions to the demands and expectations of others. Being a Catholic does *not* mean the abdication of moral responsibility for one's own actions. As a Catholic one may be expected to have regard to authoritative texts within the Church's tradition, including: Scripture, official Vatican pronouncements on the requirements of the moral life, and the works of theologians and exegetes. The duty to inform one's conscience is *not* confined to looking at formal Church sources, however. Regard may also properly be had to, for example, the insights provided by modernity, science, medicine, psychology, philosophy, law, logic and experience. [168] Having informed one's conscience to the best of one's ability, the duty of the moral agent is then to act in accordance with that informed conscience. To act contrary to that conscience is to act immorally. This is because to act against one's conscience is to betray oneself as a moral agent. If you act contrary to your conscience you act immorally, no matter what you do. [169] And to purport to hand over one's moral responsibility to another - and to act in a manner simply because told to by some external source, whether it be Archbishop Burke or Pope Benedict XVI - is to act immorally; committing, in Kantian terms, the sin of "willful heteronomy". [170] As is stated in *Gaudium et Spes* the pastoral constitution, promulgated at the Second Vatican Council, on the Church in the modern world:

> "God willed that men and women should be left free to make their own decisions, so that they might of their own accord seek their creator and freely attain their full and blessed perfection by cleaving to God. Their dignity, therefore, requires them to act out of conscious and free choice, and <u>not</u> *by their own blind impulses or by external constraints*." [171]

10.13 In sum it is not Catholicism *per se* but a particular (and peculiar) presentation or understanding of Catholicism which denies the possibility of a Catholic judge holding that questions of law should properly be separated from question of morality and that a judge's duty is to determine and apply the law in accordance with the law and not on the basis of his private or public moral beliefs of those of the Church of which he or she is a member. What this might mean is that if you do not believe in the individual freedom of conscience of Catholics to differ from the Church, you will have serious difficulty in conscientiously carrying out your judicial role according to law, or in advising others how they should to act as (Catholic) judges.

10.14 So while one might properly be a political conservative and a Catholic willing to display one's independence from the hierarchy (for example, Justice Scalia has repeatedly stated that his Catholicism has no influence or impact on his decision making

as a judge[172]) I find it very difficult to see how one could be a civil judge and a conservative Catholic in "conformist" mode which Professor Robert George appears to say is the only true way of being Catholic and who would therefore appear to deny the very possibility of lawful and conscientious dissent from Church pronouncements. It is this latter model of Catholicism which leads to the constitutionally unacceptable conclusion that a judge's Catholicism impacts upon his judicial role such that, because of considerations derived from his religion, the Catholic judge might be led (or compelled) by Church teaching to come to a different decision in a particular case from a non-Catholic.

10.15 The alternative (constitutionally compatible) vision of Catholicism for those in public life was best expressed John F. Kennedy in his 1960 Address to South Baptist Leaders in Houston, Texas when he said:

> "I believe in an America where the separation of church and state is absolute -- where no Catholic prelate would tell the President (should he be a Catholic) how to act and no Protestant minister would tell his parishioners for whom to vote -- where no church or church school is granted any public funds or political preference -- and where no man is denied public office merely because his religion differs from the President who might appoint him or the people who might elect him.
>
> I believe in an America that is officially neither Catholic, Protestant nor Jewish -- where no public official either requests or accepts instructions on public policy from the Pope, the National Council of Churches or any other ecclesiastical source -- where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials -- and where religious liberty is so indivisible that an act against one church is treated as an act against all.
>
> …
>
> [C]ontrary to common newspaper usage, I am not the Catholic candidate for President [but the candidate] who happens also to be a Catholic. I do not speak for my church on public matters -- and the church does not speak for me.
>
> Whatever issue may come before me as President, if I should be elected -- on birth control, divorce, censorship, gambling, or any other subject -- I will make my decision in accordance with these views, in accordance with what my conscience tells me to be in the national interest, and without regard to outside religious pressure or dictate. And no power or threat of punishment could cause me to decide otherwise.
>
> *But if the time should ever come -- and I do not concede any conflict to be remotely possible -- when my office would require me to either violate my conscience, or violate the national interest, then I would resign the office, and I hope any other conscientious public servant would do likewise.*" [173]

[1] It might be said that the Donatist controversy in the 5th century African Church of Saint Augustine first crystallised the issues of conformity of believers with the Western Church with imperial (and later Papal) demands. The formal condemnation by the bishops of the North African Church, at the instigation of Saint Augustine, of the theologians Pelagius and Caelestius for the views imputed to them on grace and original sin (a condemnation later confirmed by Pope Innocent I and then reversed, at least temporarily, by his immediate successor in office, Pope Zosimus) provides another 5th century CE example of tensions between conformism and non-conformism in Catholic Church history. Subsequently in the High Middle Ages the long running politico-theological dispute between the Papal and Imperial parties (known respectively as the Guelphs and Ghibellines in 13th century Italy) arising from the 11th century investiture controversy morphed into the dispute between Conciliarist and Papalists in the later Middle Ages. The 16th century Protestant Reformation marked a particularly strong expression of non-conformity within the Western Church but even post-Reformation Catholicism did not become monolithic or free from dissenting or alternative voices of non-conformity, as may be seen from the eighteenth and nineteenth century papacy's repeated condemnations of liberalism and Gallicanism. The apparent triumph of the Ultramontane party at least within Rome led to condemnations of continuing tendency towards Catholic non-conformism characterised as the "heresies" of Americanism and subsequently of Modernism. It might be thought that the Second Vatican Council marked the ascendancy of the non-conformist tendency within the Church in the 20th century but the long Papacy of John Paul II and the election of Benedict XVI as Pope might seem to mark a renewed ascendancy of conformist Catholicism.

[2]Saint Augustine of Hippo Sermon 162C ((Dolbeau 10, Dolbeau 26, Mainz 27) *Sermon of the Blessed Augustine on the words of the Apostle to the Galatians where Paul takes Peter to task* as translated by Peter Brown in *Saint Augustine of Hippo* (revised edition, 2000):

> "We who preach and write books, we write in a manner altogether different from the manner in which the canon of the Scriptures has been written. We write while we make progress. We learn something new every day. We dictate at the same time as we explore. We speak as we still knock for understanding . . . I urge your Charity, on my behalf and in my own case, that you should not take any previous book or preaching of mine as Holy Scripture . . . If anyone criticizes me when I have said what is right, he does me an injustice. But I would be more angry with the one who praises me and takes what I have written for Gospel truth (*canonicum*) than I would be with the one who criticizes me unfairly."

[3] See *Lumen Gentium: the Dogmatic Constitution of the Church*, promulgated by Pope Paul VI on 21 November 1964 at paragraph 25:

> "Bishops, teaching in communion with the Roman Pontiff, are to be respected by all as witnesses to divine and Catholic truth. *In matters of faith and morals, the bishops speak in the name of Christ and the faithful are to accept their teaching and adhere to it with a religious assent. This religious submission of mind and will must be shown in a special way to the authentic magisterium of the Roman Pontiff, even when he is not speaking ex cathedra*"

[4] See for example Pius XII Encyclical *Humani Generis: concerning some false opinions threatening to undermine the foundations of Catholic doctrine*, 12 August 1950 at paragraphs 20-21

> "20. Nor must it be thought that what is expounded in Encyclical Letters does not of itself demand consent, since in writing such Letters the Popes do not exercise the supreme power of their Teaching Authority. For these matters are taught with the ordinary teaching authority, of which it is true to say: 'He who heareth you, heareth me';[Luke, X, 16] and generally what is expounded and inculcated in Encyclical Letters already for other reasons appertains to Catholic doctrine. But if the Supreme Pontiffs in their official documents purposely pass judgment on a matter up to that time under dispute, it is obvious that that matter, according to the mind and will of the Pontiffs, cannot be any longer considered a question open to discussion among theologians. …
>
> 21. … God has given to His Church a living Teaching Authority to elucidate and explain what is contained in the deposit of faith only obscurely and implicitly. This deposit of faith our Divine Redeemer has given for authentic interpretation not to each of the faithful, not even to theologians, but only to the Teaching Authority of the Church."

[5] Congregation for the Doctrine of the Faith Doctrinal *Commentary on the Concluding Formula of the Profession of Faith required of those assuming an office to be exercised in the name of the Church* **(**June 29, 1998, the Solemnity of the Blessed Apostles Peter and Paul.) following upon Pope John Paul II *Ad Tuendam Fidem* (Apostolic Letter *Motu Proprio*) 18 May 1997:

[T]eachings on faith and morals [may be] presented as true *or at least as sure* … A proposition contrary to these doctrines can be qualified as *erroneous* or, in the case of teachings of the prudential order, as *rash* or *dangerous* and therefore '*tuto doceri non potest*' … In every profession of faith, the Church verifies *different stages* she has reached on her path toward the definitive meeting with the Lord. *No content is abrogated with the passage of time*"

[6] Pope Benedict XVI in a his Christmas message to the Roman Curia (22 December 2005):

"[W]e must learn to understand more practically than before that the Church's decisions on contingent matters - for example, certain practical forms of liberalism or a free interpretation of the Bible - should necessarily be contingent themselves, precisely because they refer to a specific reality that is changeable in itself. It was necessary to learn to recognize that in these decisions it is only the principles that express the permanent aspect, since they remain as an undercurrent, motivating decisions from within. On the other hand, not so permanent are the practical forms that depend on the historical situation and are therefore subject to change. Basic decisions, therefore, continue to be well-grounded, whereas the way they are applied to new contexts can change."

[7] Cardinal Joseph Ratzinger, "Theology is Not Private Idea of Theologian," *L'Osservatore Romano*, English Weekly Edition, July 2, 1990, 5 a press statement to accompany the release of CDF's 1990 document, *Donum Veritatis: Instruction On The Ecclesial Vocation of the Theologian*.

"[T]here are magisterial decisions which cannot be and are not intended to be the last word on the matter as such, but are a substantial anchorage in the problem and are first and foremost an expression of pastoral prudence, a sort of provisional disposition. *Their core remains valid but the individual details influenced by the circumstances at the time may need further rectification. In this regard one can refer to the statements of the Popes during the last century on religious freedom as well as the anti-modernistic decisions at the beginning of this century, especially the decisions of the Biblical Commission of that time*. As a warning cry against hasty and superficial adaptations they remain fully justified; a person of the stature of Johann Baptist Metz has said, for example, that the antimodernist decisions of the Church rendered a great service in keeping her from sinking into the liberal-bourgeois world. But *the details of the determinations of their contents were later superseded once they had carried out their pastoral duty at a particular moment.*"

[8] See Sanford Levinson *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988) at 55:

"The constitutional oath may not be a 'religious Test' for those who define religion as necessarily including affirmations of supernatural beings and theological propositions, but it is surely a test establishing one's devotion to the civil religion as a predicate condition for the ability to hold office. It affirms, among other things, that any conflicts felt by office holders between the demands of their religion and those of the law will be decided in favour of the law"

[9] See Daniel L. Dreisbach "The Constitution's forgotten religion clause: reflections on the Article VI religious test ban" 38 *Journal of Church & State* 261, 286 (1996:

"[M]any delegates to the State conventions were unwilling to grant the new national regime authority to implement a practice (i.e. religious tests) that was common at the State level precisely because they wanted to retain the State tests and they feared a Federal [religious] test might displace existing State [religious] tests. ... There was a consensus that the Constitution denied the national government authority to administer religious tests because it was believed that religion was a matter best left to individual citizens and the respective State governments. In short the Constitution as written in 1787 deferred to States on matters regarding religion"

[10] See Thomas C. Grey "The Constitution as Scripture" 37 *Stanford Law Review* 1, 18 (1984):

"The Constitution ... proclaims itself 'the supreme Law of the Land.' The Constitution's symbolic function is most clearly manifest in the third clause of article VI, which requires that all state and federal officers must swear or affirm 'to support this Constitution.' The oath is a ritual of allegiance, requiring officers to affirm their primary loyalty to the Union that the Constitution represents. This is emphasized by the proviso immediately following the oath requirement: 'but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.' The 'but' suggests that the Framers considered the constitutional oath a substitute for the religious tests the colonists were familiar with under the English established church. To push the point a bit: America would have no national church, as the first amendment later made explicit, yet the worship of the Constitution would serve the unifying function of a national civil religion."

[11] By the Test Act 1672 the English Parliament – in order to preserve itself and its ancient constitution and liberties –sought to exclude Catholics from public life by imposing the requirement of a religious test or oath on all those holding any public office, civil or military in England. The Test Act of 1678 extended the Test requirements to all those sitting in – or voting for – Parliament, and all peers in the realms of England, Scotland and Ireland to take an oath by which they publicly and expressly repudiated as "superstitious and idolatrous" what were then understood to the specifically Catholic doctrines of transubstantiation, the sacrifice of the Mass, and the invocation of Mary and the (other) saints. the first statute passed by the English Parliament in the reign of William and Mary, the Crown and Parliament Recognition Act 1689 (the long title of which was "An Act for removing and Preventing all Questions and Disputes concerning the Assembling and Sitting of this present Parliament") as follows:

> "I A B Do sincerely Promise and Swear that I will be Faithfull and bear true Allegiance to Their Majesties King William and Queen Mary So help me God.
>
> I A B Do Swear that I do from my Heart Abhor Detest and Abjure as Impious and Heretical that damnable Doctrine and Position That Princes Excommunicated or Deprived by the Pope or any Authority of the Sea of Rome may be Deposed or Murdered by their Subjects or any other whatsoever And I do Declare that no Foreign Prince, Person, Prelate State or Potentate hath or ought to have any Power Jurisdiction Superiority Preeminence or Authority Ecclesiastical or Spiritual within this Realm So help me God."

[12] The Scottish Act for Preventing the Growth of Popery 1700 prescribed the following oath:

> "I do sincerely from my heart profess and declare before God, who searches the heart, that I do deny, disown and abhor these tenets and doctrines of the papal Romish church namely: the supremacy of the pope and bishop of Rome over all pastors of the Catholic church; his power and authority over kings, princes and states and the infallibility that he pretends to either without or with a general council; his power of dispensing and pardoning; the doctrine of transubstantiation and the corporal presence with the communion without the cup in the sacrament of the Lord's supper; the adoration and sacrifice professed and practised by the popish church in the mass; the invocation of angels and saints; the worshipping of images, crosses and relicts; the doctrine of supererogation, indulgences and purgatory and the service and worship in an unknown tongue; all which tenets and doctrines of the said church I believe to be contrary to and inconsistent with the written word of God. And I do from my heart deny, disown and disclaim the said doctrines and tenets of the church of Rome as in the presence of God, without any equivocation or mental reservation, but according to the known and plain meaning of the words as to me offered and proposed, so help me God.

[13] Whereas Connecticut (until 1818) and Rhode Island (until 1843) elected to continuing operating under their pre-independence Royal charters, the other former colonies proceeded in the period immediately around and after their joint Declaration of Independence in 1776 to create new State constitutions. Many of these State constitutions and bills of rights proclaimed - to varying degrees - the idea of religious toleration (if not liberty). At the same time, however all of these States which did formulate new independent State constitutions (with the exception only of Virginia and New York) also introduced in these independence Constitutions new religious tests for the holding of public office within those States.. Thus New Jersey's 1776 constitution permitted in Article XIX "all persons, professing a belief in the faith of any Protestant sect. who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature". Article III of the 1776 constitution of South Carolina required that its governor and commander-in-chief, lieutenant-governor, a privy council, should be "all of the Protestant religion". North Carolina's 1776 constitution provided in Article XXXII that "no person, who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State." The 1784 Constitution of the State of New Hampshire (revised 1792) required senators and representatives to be of the Protestant religion. The Georgia Constitution of 1777 also used an oath or test to screen out all but Protestants from holding public office. The 1786 constitution of Vermont (after its post-Independence secession from New Hampshire) required members of the State Assembly to subscribe to a declaration of their belief "in one God, the Creator and Governor of the Universe, the rewarder of the good, and punisher of the wicked" their "acknowledge[ment] of the scriptures of the Old and New Testament to be given

by divine inspiration" and that the "own[ed] and profess[ed] the Protestant religion." The 1776 constitution of Delaware did not require a belief specifically in Protestantism but instead required in Article 22 that all public officials should attest to their acceptance of the orthodox Christian doctrine of the Trinity by swearing to their belief in "God the Father, in Jesus Christ his only Son and in the Holy Ghost". Similarly Maryland's 1776 Constitution required that any holding public office in the State be professed and believing Christian as did the 1780 Constitution of the State of Massachusetts in providing that "no person shall be eligible to this office, unless, at the time of his election… he shall declare himself to be of the Christian religion" and requiring a declaration from those elected to State office or to the Legislature must to the effect that they "believe[d[the Christian religion, and have firm persuasion of its truth." Pennsylvania's 1776 Constitution allowed at least Unitarians and post-Christian theists/deists to hold office in requiring a belief in "one God, the Creator and Governor of the universe, the rewarder of the good and punisher of the wicked" albeit with an "acknowledge[ment of] the Scriptures of the Old and New Testament to be given by Divine inspiration".

[14] See subsequently Chief Justice) Oliver Ellsworth *Essays on the Constitution of the United States 1787-1788* (P. Ford, ed., 1892) at 169 quoted in Gerard V. Bradley "No religious test clause and the constitution of religious liberty: a machine that has gone of itself" 37 *Case Western Reserve Law Review* 674, 714 (1986-1987)

[15] Judge Michael Merz "The Conscience of a Catholic judge" 29 *University of Dayton Law Review* 305, 314, 318 (2003-2004):

> "While political leaders no longer call on Catholics to renounce the pope, it is different for Catholic federal judges. If America has a civil religion, judges are its priests. And before they can be ordained, they have to renounce any un-American ideas, such as being too Catholic. No-one of course cares whether a Catholic federal judge believes in transubstantiation or a more philosophical modern version of the Real Presence. The concern is about separation of Church and State, and how closely a Catholic judge will follow Church teaching on moral questions. .... Where the legislature has made a different decision from the Pope [on the licitness of the death penalty] a Catholic can still be a conscientious judge and participate in capital cases."

[16] See Sandford Levinson "Is it possible to have a serious discussion about religious commitment and judicial responsibilities ?" 4 *University of Saint Thomas Law Journal.*280, 281-2 (2006):

> "To the extent that individuals present themselves to others as significantly constituted by their religious identity, it seems fair to me that they subject themselves to being questioned about the implications of those beliefs for the performance of their public roles. It will not do, for example, to say that 'I always ask "What would Jesus do ?"' and then claim an entitlement based either on the No Test Oath of Article VI or the Free Exercise Clause of the First Amendment to refrain from answering questions lie 'How is it you discern what Jesus would do ?' or 'Is it conceptually possible that the law, correctly interpreted, would require quite opposite of what Jesus would do ? If so, which would take priority ?' To the extent that a secular person can be examined on the implications of her belief for the performance of a public role – including membership on a court – the same should be true for someone whose beliefs are presented as religiously based. This is, I believe, required by our commitment to equality. I am sympathetic to the claims that religious persons are denied equal concern and respect when they are told they ought not to speak in their own voice in the public square. By the same token I am unsympathetic to the claim that they should be exempt from the same degree of scrutiny of their beliefs that is received by secularists.

[17] See Thomas L. Shaffer, AALS Presentation "Roman Catholic Lawyers in the United States of America", 21 *Journal of Law and Religion* 305 (2005-2006):

> To talk about the German, Irish, Italian, Polish, and Slavic immigrants is to talk about pervasive WASP bigotry, which has not disappeared and probably won't disappear, not even with five Catholic justices presiding in Washington. …. It has, of course, never been that easy or that clear, and it was far from over in 1960. I did my basic training for the legal profession in the largest law firm in Indiana. Until I got there in 1961 it had no Catholics (no Jews either, needless to say–no black people, not even to sweep the floor–and no women except secretaries and a librarian). A partner from the firm came to Notre Dame to recruit, for the first time, for seeking a new associate (male, white), after Catholic clients began to notice who wasn't in the office, and perhaps to suspect that the absence of Catholics had to do with the fact that its founder was said to have been in the Klan–and not in response either to President Kennedy's ascension or football in South Bend. I was treated very well by the firm–no complaints. It may have helped that the firm inadvertently recruited another Catholic that year, at Indiana University. The firm has Jews and women lawyers now; we Catholics led the way."

[18] *Gillick v. West Norfolk Area. Health Authority*[1986] AC 112

[19] *Catholic Charities of Sacramento Inc v Department of Managed Health Care* (Supreme Court of California) 1 March 2004

[20] *R (John Smeaton on Behalf of Society for the Protection of Unborn Children) v. The Secretary of State for Health, Schering Health Care Limited, Family Planning Association* [2002] EWHC 610 (Admin)

[21] See: *R (Pretty) v. Director of Public Prosecutions* [2002] AC 800; *Pretty v. United Kingdom* (2002) 35 EHRR 1; *Gonzales v. Oregon* 546 US 243 (2006)

[22] *R (Burke) v. General Medical Council* [2006] 1 QB 273

[23] *Airedale N.H.S. Trust v. Bland* [1993] AC 789; *Schiavo v. Schindler re: guardianship of Theresa Marie Schiavo*, SCOTUS orders denying certiorari of 17 and 24 March 2005

[24] *In re A: Children (Conjoined Twins: surgical separation)* [2001] Fam 147

[25] *St. George's Healthcare N.H.S. Trust v. S.* [1999] Fam 26, CA

[26] *McFarlane v. Tayside Health Board* 2000 2 AC 59; *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309

[27] Application No. 17004/90 *H. v. Norway*, European Commission of Human Rights, 19 May 1992*; Kelly v. Kelly* 1997 SC 285, IH

[28] *Tysiaç v. Poland* (2007) 45 EHRR 42.

[29] *Re Monica Roa* Case D6122, Constitutional Court of Colombia, 10 May 2006

[30] See Judge D'Army Bailey "The religious commitments of judicial nominees" 20 *Notre Dame Journal of .Law, Ethics & Public Policy* 444 (2006) discussing the Tennessee "bypass law" allowing for the otherwise required parental notification for this procedure to be bypassed by judicial order

[31] *Evans v. Amicus Health Care* [2005] Fam 1, CA; *Evans v. United Kingdom* (2005) 38 EHRR 21

[32] *Dudgeon v. United Kingdom* (1983) 5 EHRR 573; *Lawrence v. Texas* 539 US 558 (2003)

[33] See: *Braschi*, 543 N.E.2d 49 (1989) (New York Court of Appeals); *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, HL(E); *Karner* v. *Austria* (2004) 38 EHRR 24

[34] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, HL(E)

[35] Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* 1 April [2008] ECR I-nyr (Grand Chamber); *In re X* Constitutional Court of Colombia, 17 April 2009

[36] *T Petitioner*, 1997 SLT 724, IH; *Fretté v. France* (2005) 38 EHRR 21

[37] *In re W. (A Minor) (Adoption: Homosexual Adopter)* [1997] 3 WLR 768; *E.B. v. France*, ECtHR Grand Chamber, 28 January 2008

[38] See *Halpern* (10 June 2003), 65 O.R. (3d) 161 (Ontario Court of Appeal); *EGALE Canada* (1 May 2003), 225 D.L.R. (4th) 472 (British Columbia Court of Appeal); *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (Québec Court of Appeal *)*; *Goodridge and others v. Department of Public Health and another* 798 N.E.2d 941 and *In re the Opinions of the Justices to the Senate*, 802 N.E.2d 605 (Supreme Judicial Court of Massachusetts)*; Minister of Home Affairs v. Fourie* unreported decision of 1 December 2005 (South African Constitutional Court); and *In re Marriage cases*, unreported decision of the Supreme Court of California, 15 May 2008.

[39] *Baker v. State of Vermont* 744 A.3d 864, 170 VT 194 (1999) (Vermont Supreme Court):

[40] See *Boyce v. Queen* [2005] 1 AC 400 (Judicial Committee of the Privy Council on appeal from the Supreme Court of Barbados) and *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, JCPC. Compare with: *Woodson v North Carolina* (1976) 428 US 280 and *Roberts v Louisiana* (1977) 431 US 633. See too *Edwards v The Bahamas* (2001) Report No 48/01 where the Inter-American Commission decided that the mandatory death penalty for murder was inconsistent with the American Declaration of Human Rights; *Hilaire, Constantine and Benjamin v Trinidad and Tobago* (Ser C) No 94 (2002) where the Inter-American Court of Human Rights decided that it was inconsistent with the American Convention on Human Rights; and *Kennedy v Trinidad and Tobago* (2002) CCPR/C/74/D/845/1998 where the Human Rights Committee of the United Nations decided that the mandatory death penalty for murder was inconsistent with the ICCPR.

[41] See *Roper v. Simmond* 543 US 551 (2005)

[42] See *Atkins v. Virginia* 536 US 304 (2002)

[43] Offices of the Congregation for the Doctrine of the Faith *Doctrinal Note on some questions regarding the Participation of Catholics in Political Life* November 24, 2002, the Solemnity of Christ the King at paragraphs 4, 5, 6

[44] Congregation for the Doctrine of the Faith *Considerations regarding proposals to give legal recognition to unions between homosexual persons*, June 3, 2003

[45] In *De libero arbitrio* (c. 389-395 CE) I, 5, 11, also quoted and amplified by Saint Thomas Aquinas in *Summa Theologiae* (c. 1265-1274 CE) IaIIae q. 95 a. 2 and q. 96 a.2

[46] Pontifical Council for the Family *Family, Marriage and de facto unions* Vatican City, July 26, 2000

[47] Cardinal Alfonso López Trujillo President of the Pontifical Council for the Family "Eucharistic Coherence of Politicians and Legislators" (an intervention at the XI Ordinary General Assembly of the Synod of Bishops) Vatican City, October 7, 2005

> "Eucharistic coherence of politicians and lawmakers is a serious problem in quite a few nations and Parliaments. Today the projects for laws and the choices made or to be made seriously imperil 'the wonderful news', that is, the gospel of the family and life, which form an indivisible unity. The future of man and society is at stake and, in many aspects, the genuine possibility for integral evangelization. *As can often be heard, a spurious argument is made for a so-called free political choice, which would have the primacy over evangelical principals and also over the reference to right reasoning. Juridical positivism would be a sufficient explanation.* The ambiguous positions of legislators are quite well known on divorce and *de facto* couples, which at least implicitly would constitute an alternative to marriage, even though these unions are simply a 'juridical fiction' and 'the circulation of false money'. This is even worse when dealing with couples of the same sex, something unknown in the cultural histories of people and in law, even if they are not presented as 'marriage'. Presenting this juridical lie as 'marriage' and presuming to have the right to adopt children is certainly even more destructive. This whole tendency, which could invade many nations, is clearly contrary to divine law, to God's commandments, and is a negation of natural law. … Can we allow access to Eucharistic communion to those who deny human and Christian principles and values? The responsibility of politicians and legislators is great. A so-called personal option cannot be separated from the socio-political duty. This is not a 'private' problem: acceptance of the Gospel, the Magisterium and right reasoning is needed!… Politicians and legislators must know that by proposing or defending projects for iniquitous laws, they have a serious responsibility and must find a remedy for the evil done and spread in order to be allowed access to communion with the Lord who is the way, truth and life."

[48] See for example +Raymond L. Burke, Archbishop of St. Louis MI, "The Discipline regarding the denial of Holy Communion to those obstinately persevering in manifest grave sin" (2007) 96 *Periodica di Re Canonica* 3 at page 4

> "The statement of the United States' Bishops, *Catholic in Political Life* ... failed to take account of the clear requirement to exclude from Holy Communion those who, after appropriate admonition, obstinately persist in supporting public legislation which is contrary to natural moral law. .... While the

judgment regarding the disposition of the individual who presents himself to receive holy communion belongs to the minister of the sacrament, the question regarding the objective state of *Catholic politicians who knowingly and willingly hold opinions contrary to the natural moral law* would hardly seem to change from place to place.

[...]

The person who persists in grave and public sin lacks the integrity of faith, which is required to receive the sacrament.

[...]

With respect to the activity of legislatures and courts, the principle makes it clear that Catholics must oppose 'judicial decisions or civil laws that authorise or promote abortion or euthanasia'

[...]

The discipline must be applied in order to avoid serious scandal, for example, the erroneous acceptance of procured abortion against the constant teaching of the moral law. No matter how often a bishop or priest repeats the teaching of the Church regarding procured abortion, if he stand by and does nothing to *discipline a Catholic* who publicly supports legislation permitting the gravest of injustices and, at the same time, presents himself to receive holy communion, then his teaching rings hollow. To remain silent is to permit serious confusion regarding a fundamental truth of moral law. Confusion is, of course, one of the most insidious fruits of scandalous behaviour.

[...]

Catholics in public office bear an especially heavy burden of responsibility to uphold the moral law in the exercise of their office, which is exercised for the common good, especially the good of the innocent and defenceless. When they fail, they lead others, Catholics and non-Catholics alike, to be deceived regarding the evils of procured abortion and other attacks on innocent and defenceless life, on the integrity of human procreation, and on the family."

[49] Under the heading "Life will be victorious" Archbishop Naumann issued the following public statement on 9 May 2008 through *The Leaven*, the official newspaper of the Diocese of Kansas City in Kansas (see http://www.theleaven.com/V29N37ColumnistNaumann.htm)

"On the day of my return (Monday, April 21) from the exhilarating experience of participating in Pope Benedict's pastoral visit to the United States, I learned that Governor Kathleen Sebelius had vetoed the Comprehensive Abortion Reform Act (HS SB 389), which had been passed by significant majorities in both chambers of the Kansas Legislature. Last week, an attempt to override the governor's veto failed in the Senate by two votes. … . Evidently, the governor does not approve of legislators devoting energy to protecting children and women by making it possible to enforce existing Kansas laws regulating late-term abortions. …. What makes the governor's actions and advocacy for legalized abortion, throughout her public career, even more painful for me is that she is Catholic. Sadly, Governor Sebelius is not unique in being a Catholic politician supporting legalized abortion. Since becoming archbishop, I have met with Governor Sebelius several times over many months to discuss with her the grave spiritual and moral consequences of her public actions by which she has cooperated in the procurement of abortions performed in Kansas. My concern has been, as a pastor, both for the spiritual well-being of the governor but also for those who have been misled (scandalized) by her very public support for legalized abortion. It has been my hope that through this dialogue the governor would come to understand her *obligation*:

1) to take the difficult political step, but necessary moral step, of repudiating her past actions in support of legalized abortion; and

2) in the future would use her exceptional leadership abilities to develop public policies extending the maximum legal protection possible to the unborn children of Kansas.

Having made every effort to inform and to persuade Governor Sebelius and after consultation with Bishop Ron Gilmore (Dodge City), Bishop Paul Coakley (Salina) and Bishop Michael Jackels (Wichita), I wrote the governor last August requesting that she refrain from presenting herself for reception of the Eucharist *until she had acknowledged the error of her past positions, made a worthy sacramental confession and taken the necessary steps for amendment of her life which would include a public repudiation of her previous efforts and actions in support of laws and policies sanctioning abortion.* ….. I hope that my request of the governor, not to present herself for holy Communion, will provoke her to reconsider the serious spiritual and moral consequences of her past and present actions. At the same time, I pray this pastoral action on my part will help alert other Catholics to the moral gravity of participating in and/or cooperating with the performance of abortions."

[50] See for example George Cardinal Pell "Conscience: the aboriginal Vicar of Christ" 2004 Fisher Lecture delivered to the Fisher Society, University of Cambridge, 3 March 2004:

> [I[ncreasingly, even in Catholic circles, the appeal to the primacy of conscience is being used to justify what we would like to do rather than what God wants us to do. Even within Catholic discourse two different notions of conscience are at work; a) neo-pagan or secular, which feels free to override official Catholic moral teaching, even when it is confirming New Testament teaching, and b) a Christian understanding of conscience which recognises explicitly the authority of New Testament moral teaching and the official Catholic affirmation or development of that teaching. My second claim is that conscience does not, even in the second and Catholic sense, enjoy primacy, because conscience always involves a human act of judgment which could be mistaken, innocently or otherwise and the consequences of all decisions have to be played out in some ordered human community. Every human community has to limit the rights of its members to 'err' however error is defined.
>
> …
>
> [I]n Catholic theological language the claim to primacy of secular conscience is a cliché, which only requires preliminary examination for us to conclude that it needs to be refined and developed to have any plausible meaning at all. I do not even favour the substitution of the primacy of informed Christian conscience, because it is also possible that with good will and conscientious study a devout Catholic could fail to recognise some moral truth, act upon this failure and have to face the consequences."

A modified version of this essay is reprinted as "Human Dignity, Human Rights and moral responsibility" Chapter 10 of Cardinal George Pell *God and Caesar: Selected Essays on Religion, Politics, and Society* (Catholic University of America Press, 2007)

[51] See Second Vatican Council *Dignitatis Humanae : declaration on religious freedom*

[52] Pius X *Lamentabili Sane*: *syllabus condemning the errors of the modernists*, July 3, 1907 at paragraph 7

[53] Second Vatican Council *Dignitatis Humanae* 3

[54] Second Vatican Council *Dignitatis Humanae*, 1

[55] Robert George and William Saunders "The freedom of the Church and the responsibility of the State", Chapter 1 in Kenneth Grasso and Robert Hunt (eds.) *Catholicism and Religious Freedom: contemporary reflections on Vatican II's Declaration on Religious Liberty* (Rowman & Littlefield: Plymouth 2006) at page 2.

[56] Robert George and Gerard V. Bradley "Pope John Paul II" Chapter 7 in John Witte junior and Frank S. Alexander *The teaching of modern Roman Catholicism on law politics and human* nature(New York: Columbia University Press, 2007) 392 at 400-1, 426

[57] *Mirari Vos: on liberalism and religious indifferentism*, Encyclical of Pope Gregory XVI 15 August 1832

[58] Leo XIII *Longinqua Oceani: on Catholicism in the United States*, 6 January 1895 (feast of the Epiphany) at paragraph 6

[59] See for example John Courtney Murray *We hold these truths: Catholic reflections on the American proposition* (New York: Sheed & Ward, 1960) and also John Courtney Murray *Religious liberty: Catholic struggles with pluralism* (Louisville Kentucky: Westminster/John Knox Press, 1993)

[60] See Donald Pelotte *John Courtney Murray: theologian in conflict* (New York: Paulist Press, 1975) in particular Chapter 2 "Opposition and rebuke: 1950-1959"

[61] See Joseph A Komonchak, "Catholic Principle and the American Experiment: The Silencing of John Courtney Murray" (1999) 17 *U.S. Catholic Historian*, 28-44 at 39

[62] See Pius XII *Ci Riesce: a discourse to the National Convention of Italian Catholic Jurists* (6 December 1953):

> "[T]wo principles are clarified to which recourse must be had in concrete cases for the answer to the serious question concerning the attitude which the jurist, the statesman and the sovereign Catholic state

is to adopt *in consideration of the community of nations* in regard to a formula of religious and moral toleration as described above. First: *that which does not correspond to truth or to the norm of morality objectively has no right to exist, to be spread or to be activated*. Secondly: *failure to impede this with civil laws and coercive measures can nevertheless be justified in the interests of a higher and more general good*. Before all else the Catholic statesman must judge if this condition is verified in the concrete - this is the 'question of fact.' In his decision he will permit himself to be guided by *weighing the dangerous consequences that stem from toleration against those from which the community of nations will be spared, if the formula of toleration be accepted*. Moreover, he will be guided by the good which, according to a wise prognosis, can be derived from toleration for the international community as such, and indirectly for the member state. In that which concerns religion and morality he will also ask for the judgment of the Church. For her, only He to whom Christ has entrusted the guidance of His whole Church is competent to speak in the last instance on such vital questions, touching international life; that is, the Roman Pontiff."

[63] See Alfredo, Cardinal Ottaviani "Church and State: some present problems in the light of the teaching of Pius XII" (1953) 128 *American Ecclesiastical Review* 321-334:

"[T]he objection is raised:

> 'You maintain two different standards of norms or action according to what is expedient for you. In a Catholic country you uphold the idea of a confessional state, with a duty exclusive for the protection of religion. On the other hand, where you constitute a minority, you claim the right of tolerance or frankly to the equality of cults. Hence for you there are two standards or two measures.'

This is proposed as a truly embarrassing duplicity from with those Catholics who take the actual developments of civilization into account want to be freed. But it is not a question of that. It is a question of a different situation. Men who perceive themselves to be in sure possession of the truth and of justice are not going to compromise. They demand full respect for their rights. How, on the other hand, can those who do not perceive themselves secure in the possession of truth claim to hold the field alone, without giving a share to the man who claims respect for his own rights on the basis of some other principle? The concept of equality of cults and of tolerance is a product of free-thinking and of the multiplicity of religious professions. It is a logical consequence of the opinions of those men who hold on the matter of religion, that there is no place for dogmas and that only the conscience of individual persons may give the criterion and standard for the profession of faith and the exercise of worship. In that case, in those countries where such theories flourish, what wonder is it that the Catholic Church seeks to have an opportunity to carry out its divine mission and strives to have recognized those rights which it can claim as a logical consequence of the principles inherent in the legislation of those countries? It would prefer to speak and to advance its claims in the name of God. But, among those peoples, exclusiveness to its mission is not recognized. In such a case it is content to advance its claims in the name of that tolerance, of that equality and of those common guarantees by which the legislation of the countries in question is inspired. It ought not to be considered strange that the Church appeals at least to the rights of man, when the rights of God are not recognized."

[64] Robert George and Gerard V. Bradley "Pope John Paul II" Chapter 7 in John Witte junior and Frank S. Alexander *The teaching of modern Roman Catholicism on law politics and human* nature(New York: Columbia University Press, 2007) 392 at 427-8 footnote 89:

[65] See http://pewforum.org/deathpenalty/resources/transcript3.php for a transcript of Justice Scalia's address.

[66] Justice Scalia was here alluding to the formulation of Justice Blackmun in *Callins v. Collins* 510 US 1141 (1994) who stated in dissenting from denial of certioari:

"From this day forward, I no longer shall tinker with the machinery of death. For more than twenty years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, 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. The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in the affirmative. It is not simply that this Court has allowed vague aggravating circumstances to be employed, … the

problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution."

[67] See *Herrera v. Collins* 506 US 390 (1993) *per* Scalia J. concurring:

"There is no basis in text, tradition or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction. In saying that such a right exists the dissenters apply nothing but their personal opinions to invalidate the rules of more than two-thirds of the States and a Feral Rule of Criminal Procedure for which this Court itself is responsible. If the system that has been in place for two hundred years |(and remains widely approved) 'shocks' the dissenters consciences, perhaps they should doubt the calibration of their consciences or, better still, the usefulness of conscience shocking as a legal test."

[68] Contrast with Martin Luther King, Jr., "Letter from a Birmingham Jail" (1963), reprinted in *Freedom on my mind: the Columbia documentary history of the African-American experience* 347 (Manning Marble ed., 2003). relying upon as a private citizen (rather than an the holder of an office within the legal system natural law tradition to justify his movement of nonviolent resistance:

"One may well ask: 'How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. . . . One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that 'an unjust law is no law at all.' Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law."

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[69] John Paul II *Evangelium Vitae* at paragraph 56

[70] Compare, however, John T. Noonan Jr. "The religion of the Justice: does it affect constitutional decision-making?" 42 *Tulsa Law Review*. 761 at 766-7

"It is true that on the moral legitimacy of the death penalty Catholic teaching has changed. Once accepting it as a necessary prerogative of government, the Catholic Church under Pope John Paul I1 has taught that death can only be imposed in rare circumstances and not at all if the defendant can be securely imprisoned. **(**Pope John Paul **11,** *Evangelium vitae* para 56 (Mar. 25, 1995)) There is a certain hesitancy in the teaching, whose logic leads to the conclusion that a state-sponsored execution is state-sponsored homicide; the pope and bishops do not denounce the government as guilty of murder but only plead for clemency. The doctrinal development is not complete. Yet I am glad never to have had to face a case where my vote would have confirmed the death sentence. Justice Scalia, who seems reluctant to recognize the doctrinal change, has written that if it has really occurred, all Catholic judges should resign as incapable of carrying out the law. **(**Antonin Scalia, "God's Justice and Ours" *First Things* 17, 21 (May 2002) I read that statement as a rhetorical move. A federal judge rarely is asked to impose or to uphold a sentence of death. If the judge is conscientiously convinced that any taking of human life cannot be justified, it is, I believe, his duty to disqualify himself if the law requires imposition of death. I do not think that a rare recusal carries with it a declaration of incompetence to function as a judge ninety-nine percent of the time.

[71] Compare however with the views of Stevens J. (concurring) in *Baze v. Rees*, 16 April 2008, SCOTUS

"[J]ust as Justice White ultimately based his conclusion in *Furma*n [*v. Georgia*, 408 U.S. 238] on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman*, 408 US at 312 (White, J., concurring).

See too Brennan J.. in *Gregg v. Georgia*, 428 US 153 (1976) dissenting at 227:

"This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, 'moral concepts' require us to

hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society. My opinion in *Furman v. Georgia* concluded that our civilization and the law had progressed to this point and that therefore the punishment of death, for whatever crime and under all circumstances, is 'cruel and unusual' in violation of the Eighth and Fourteenth Amendments of the Constitution. I shall not again canvass the reasons that led to that conclusion. I emphasize only that foremost among the 'moral concepts' recognized in our cases and inherent in the Clause is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings - a punishment must not be so severe as to be degrading to human dignity. A judicial determination whether the punishment of death comports with human dignity is therefore not only permitted but compelled by the Clause.

[…]

Death for whatever crime and under all circumstances 'is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. … An executed person has indeed `lost the right to have rights.'' Id., at 290. Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment. Id., at 279. The fatal constitutional infirmity in the punishment of death is that it treats 'members of the human race as non-humans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.' Id., at 273. As such it is a penalty that "subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause].' I therefore would hold, [428 U.S. 153, 231] on that ground alone, that death is today a cruel and unusual punishment prohibited by the Clause. 'Justice of this kind is obviously no less shocking than the crime itself, and the new `official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first.'"

See too Marshall J. in *Furman v. Georgia*, 408 U.S. 238, 314 (1972) (concurring opinion),

"In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve 'a major milestone in the long road up from barbarism' and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment."

[72] See http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rota_en.html

[73] *Sed contra* Thomas Aquinas *Summa Theologiae* ((c. 1265-1274 CE)) IIaIIae q. 71 a. 3:

"It is unlawful to cooperate in an evil deed, by counseling, helping, or in any way consenting, because to counsel or assist an action is, in a way, to do it, and the Apostle says (Romans 1:32) that 'they . . . are worthy of death, not only they that do' a sin, 'but they also that consent to them that do' it. Hence it was stated above (Question 62, Article 7), that all such are bound to restitution. Now it is evident that an advocate provides both assistance and counsel to the party for whom he pleads. Wherefore, if knowingly he defends an unjust cause, without doubt he sins grievously, and is bound to restitution of the loss unjustly incurred by the other party by reason of the assistance he has provided. If, however, he defends an unjust cause unknowingly, thinking it just, he is to be excused according to the measure in which ignorance is excusable.

…

If an advocate believes from the outset that the cause is just, and discovers afterwards while the case is proceeding that it is unjust, he ought not to throw up his brief in such a way as to help the other side, or so as to reveal the secrets of his client to the other party. But he can and must give up the case, or induce his client to give way, or make some compromise without prejudice to the opposing party. ...

[I]t is lawful for an advocate, in defending his case, prudently to conceal whatever might hinder its happy issue, but it is unlawful for him to employ any kind of falsehood."

[74] The "religious lawyering" movement – which would insist that a lawyer apply his religious beliefs to assess the morality of a cause of a client – wholly fails to rake account of the fundamental principle of access to justice for all – the undeserving as much as the deserving – to the law. It also does not take into account the professional obligation , central to practice at the bar in the United Kingdom at least, of the "cab-rank rule", namely that, if available for work, a barrister or advocate is professionally obliged to take on any case asked of him or her. For examples of academic "religious lawyers" theorizing within the context of Catholic tradition, about the ethics professional legal practice see among others:

- Larry Cunningham "Can a Catholic lawyer represent a minor seeking a judicial by-pass for an abortion ?; a moral and canon law analysis". 44 *Journal of Catholic Legal Studies* 379 (2005);
- Teresa Stanton Collett "See no evil, seek no evil, do no evil: client selection and co-operation with evil 66 *Fordham Law. Review* 1339 (1997-1998);
- Teresa Stanton Collett "Professional versus moral duty: accepting appointments in unjust civil cases" 32 *Wake Forest aw. Review* 635 (1997);
- Robert J. Muise Professional responsibility for Catholic lawyers: the judgment of conscience 71 *Notre Dame Law. Review* 771 (1995-1996).

[75] See for example 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

[76] Scott C. Idleman "Private Conscience, Public Duties: the unavoidable conflicts facing a Catholic Justice" 4 *University of Saint Thomas Law Journal.*312 at 320 (2006)

[77] James Alison *On being liked* (2003) in Chapter 6 "Being wrong and telling the truth" at page 95

[78] See Eduardo M. Peñalver "Restoring the Right Constitution?" 116 *Yale Law Journal* 732, 735-6 (2007):P

> "At least part of the progressive aversion to natural law theory... is likely rooted in a persistent hunch that there is something inherently conservative about natural law reasoning. It is hard to blame recent observers for forming that opinion. The most prominent of the 'new' natural law theorists, after all, have expended enormous energy advocating expansive legal codification of a decidedly "old" sexual morality (*See* Stephen Macedo, "Against the Old Sexual Morality of the New Natural Law", in (Robert P. George ed. *Natural Law Liberalism and Morality* (Oxford: Clarendon Press, 1996) *supra* note 2, at 27, 27.) Princeton's Robert George, for example, has enthusiastically defended—on natural law grounds—laws criminalizing private, consensual homosexual conduct. (*See* Brief *Amicus Curiae* of the Family Research Council and Focus on the Family in Support of the Respondent at 17-24, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 *Georgetown Law Journal*. 301, 320 (1995)) And John Finnis has deployed natural law arguments in defence of laws prohibiting the distribution of contraception to unmarried couples.(*See* John . Finnis, *Law, Morality, and "Sexual Orientation,"* 9 Notre Dame Journal of Law, Ethics and Public Policy 11, 38-39 (1995)) There is no essential connection, however, between natural law reasoning and the specific agenda advocated by George and Finnis.

[79] John Gardner "Nearly Natural Law" 52 *American Journal of Jurisprudence* 1, 22-23 (2007)

[80] See too Cardinal Joseph Ratzinger: *Crises of Law* an address was delivered on the occasion of being conferred the degree of Doctor *Honoris Causa* by the LUMSA Faculty of Jurisprudence in Rome, Nov.10, 1999.

> "[J]uridical positivism … has taken on the form of the theory of consensus: if reason is no longer able to find the way to metaphysics as the source of law, the State can only refer to the common convictions of its citizens' values, convictions that are reflected in the democratic consensus. Truth does not create consensus, and consensus does not create truth as much as it does a common ordering. The majority determines what must be regarded as true and just. In other words, *law is exposed to the whim of the majority, and depends on the awareness of the values of the society at any given moment, which in turn is determined by a multiplicity of factors. This is manifested concretely by the progressive disappearance of the fundamentals of law inspired in the Christian tradition. … Because in modern States metaphysics, and with it, Natural Law, seem to be definitely depreciated, there is an ongoing*

transformation of law, the ulterior steps of which cannot yet be foreseen; the very concept of law is losing its precise definition."

[81] Congregation for the Doctrine of the Faith *Doctrinal Note on some questions regarding the participation of Catholics in political life* (November 24, 2002):

> "A kind of cultural relativism exists today, evident in the conceptualization and defense of an ethical pluralism, which sanctions the decadence and disintegration of reason and the principles of the natural moral law. *Furthermore, it is not unusual to hear the opinion expressed in the public sphere that such ethical pluralism is the very condition for democracy. As a result, citizens claim complete autonomy with regard to their moral choices, and lawmakers maintain that they are respecting this freedom of choice by enacting laws which ignore the principles of natural ethics and yield to ephemeral cultural and moral trends, as if every possible outlook on life were of equal value.* At the same time, the value of tolerance is disingenuously invoked when a large number of citizens, Catholics among them, are asked not to base their contribution to society and political life through the legitimate means available to everyone in a democracy on their particular understanding of the human person and the common good. *The history of the twentieth century demonstrates that those citizens were right who recognized the falsehood of relativism, and with it, the notion that there is no moral law rooted in the nature of the human person, which must govern our understanding of man, the common good and the State*."

[82] Pius XII "False concepts of law based on juridical positivism and State absolutism" Address delivered to the Roman Rota, 13 November 1949:

> "Juridical positivism and State absolutism [are] two manifestations which in their turn derive from and depend on one another. Remove from law the foundation made up of divine, natural and positive law and therefore immutable and nothing remains on which to base it but the law of the State as the supreme norm. There we have the beginning of the absolute State. Likewise this absolute State will necessarily seek to subject all things to its will and especially make law itself serve its own proper ends. Juridical positivism and state absolutism have changed and disfigured the noble countenance of justice, whose essential foundations are law and conscience."

[83] See Pope John Paul II *Evangelium Vitae* at paragraphs 69-70:

> "69. ... [I]ndividuals claim for themselves in the moral sphere the most complete freedom of choice and demand that the State should not adopt or impose any ethical position but limit itself to guaranteeing maximum space for the freedom of each individual, with the sole limitation of not infringing on the freedom and rights of any other citizen. On the other hand, it is held that, in the exercise of public and professional duties, respect for other people's freedom of choice requires that each one should set aside his or her own convictions in order to satisfy every demand of the citizens which is recognized and guaranteed by law; in carrying out one's duties the only moral criterion should be what is laid down by the law itself. Individual responsibility is thus turned over to the civil law, with a renouncing of personal conscience, at least in the public sphere.
>
> 70. *At the basis of all these tendencies lies the ethical relativism which characterizes much of present-day culture*. There are those who consider such relativism an essential condition of democracy, inasmuch as it alone is held to guarantee tolerance, mutual respect between people and acceptance of the decisions of the majority, whereas moral norms considered to be objective and binding are held to lead to authoritarianism and intolerance. But it is precisely the issue of respect for life which shows what misunderstandings and contradictions, accompanied by terrible practical consequences, are concealed in this position. It is true that history has known cases where crimes have been committed in the name of 'truth'. But equally *grave crimes and radical denials of freedom have also been committed and are still being committed in the name of "ethical relativism"*. When a parliamentary or social majority decrees that it is legal, at least under certain conditions, to kill unborn human life, is it not really making a 'tyrannical' decision with regard to the weakest and most defenceless of human beings? Everyone's conscience rightly rejects those crimes against humanity of which our century has had such sad experience. But would these crimes cease to be crimes if, instead of being committed by unscrupulous tyrants, they were legitimated by popular consensus?"

Compare and contrast this approach with Robert George "The Natural Law due process philosophy" 69 *Fordham Law Review* 2301, 2307 (2000-2001):

"While I think that pro-abortion policies whether put into place legislatively or by judicial action are unjust to their unborn victims *I am not in the least troubled by the proposal to settle the question of abortion via the processes of representative democracy, even in states like New York that are likely to resolve the question in what I judge to be the wrong direction*. And just to be clear I do in fact that it is proper (and even 'good for democracy') for the people and their elected representatives to deliberate and decide maters of high moral import. It would, in my opinion, be a mistake to remove all such maters from the domain of ordinary democratic deliberation."

[84] As Cardinal, Joseph Ratzinger has expressed some diffidence in using the term "natural law". See Ratzinger "That which holds the world together: The Pre-political Moral Foundations of a Free State" a talk given at the Catholic Academy of Bavaria in January 2004 reprinted in his *Europe today and tomorrow: addressing the fundamental issues* (Ignatius Press: San Francisco 2000) at pages 75-6:

"[Consequent upon the Reformation] it was necessary to elaborate a law, or at least a legal minimum, antecedent to dogma: *the sources of this law then had to lie, no longer in faith, but in nature and in human reason. Hugo Grotius, Samuel von Pufendorf and others developed the idea of natural law, which transcends the confessional boundaries of faith by establishing reason as the instrument whereby law can be posited in common.*

Natural law has remained (especially in the Catholic Church) the key issue in dialogues with secular society and with other communities of faith in order to appeal to the reason we share in common and to seek the basis for a consensus about the ethical principles of law in a secular, pluralistic, society. Unfortunately, *this instrument has become blunt. Accordingly I do not intend to appeal to it for support in this conversation*. The idea of natural law presupposed a concept of "nature" in which nature and reason overlap, since nature itself is rational. *With the victory of the theory of evolution this view of nature has capsized: nowadays we think that nature as such is not rational. ...* One final element of the natural law that claimed (at least in the modern period) that it was ultimately a rational law has remained, namely human rights. These are incomprehensible without the presupposition that man *qua* man, thanks simply to his membership in the species *man*, is the subject of rights and that his being bears within itself values and norms that must be discovered – but not invented. Today, we ought perhaps to amplify the doctrine of human rights with *a doctrine of human obligations and human limitations*. This could help us to grasp anew the relevance of the question as to *whether* there might exist a rationality of nature and hence a rational law for man and for his existence in the world."

[85] Benedict XVI, Address to International Congress on Natural Moral Law of the Lateran University, 12 February 2007.

[86] Pope John Paul II *Evangelium Vitae* (March 25, 1995) paragraph 72-73

[87] Thomas Aquinas *Summa Theologiae* (c. 1265-1274 CE) IaIIae q. 96 a 4

[88] Robert George "Natural Law" 31 *Harvard Journal of Law & Public Policy* 171 194 Footnote 38 (2007)

[89] Thomas Aquinas *Summa Theologiae* (c. 1265-1274 CE) IIaIIae q. 60 a 5

[90] John Finnis *Aquinas: moral, political and legal theory* (Oxford: Oxford University Press, 1998) at 250

[91] Robert George "Natural Law" 31 *Harvard Journal of Law & Public Policy* 171, 194 (2007)

[92] Francis Beckwith "Taking theology seriously: the status of the religious beliefs of judicial nominees for the federal court bench" 20 *Notre Dame Journal of Law Ethics & Public Policy* 455, 467 (2006)

[93] John Finnis *Aquinas: moral, political and legal theory* (Oxford: Oxford University Press, 1998) at 272 footnote 105

[94] See Congregation for the Doctrine of the Faith *Declaration on Procured Abortion* (November 1974) at paragraph 21:

"It must in any case be clearly understood that whatever may be laid down by civil law in this matter, man can never obey a law which is in itself immoral, and such is the case of a law which would admit

in principle the liceity of abortion. Nor can he take part in a propaganda campaign in favour of such a law, or vote for it. Moreover, he may not collaborate in its application."

[95] See however Cardinal Ratzinger "Worthiness to receive Holy Communion: general principles" Memorandum to Cardinal Theodore McCarrick, July 2004 at paragraph 3:

> "Not all moral issues have the same moral weight as abortion and euthanasia. For example, if a Catholic were to be at odds with the Holy Father on the application of capital punishment or on the decision to wage war, he would not for that reason be considered unworthy to present himself to receive Holy Communion. While the Church exhorts civil authorities to seek peace, not war, and to exercise discretion and mercy in imposing punishment on criminals, it may still be permissible to take up arms to repel an aggressor or to have recourse to capital punishment. There may be a legitimate diversity of opinion even among Catholics about waging war and applying the death penalty, but not however with regard to abortion and euthanasia.

[96] Pope Pius XII "Duties of Catholic jurists" 6 November 1949 reprinted in Reverend John D. Davis *The moral obligations of Catholic civil judges* (Washington DC: Catholic University of America Press, 1953) 217 at 223

[97] Pope Pius XII "Duties of Catholic jurists" 6 November 1949 reprinted in Reverend John D. Davis *The moral obligations of Catholic civil judges* (Washington DC: Catholic University of America Press, 1953) 217 at 224-5:

> "[A] Catholic judge cannot pronounce, except for reasons of great weight, a sentence of civil divorce – where this is in force – for a marriage valid before God and Church. He must not forget that such a sentence, in practice, does not come to touch only the civil effects but in reality rather conduces to the erroneous consideration of the actual bond as broken and of the new one as valid and binding."

[98] Congregation for the Doctrine of the Faith *Considerations regarding proposals to give legal recognition to unions between homosexual persons*, June 3, 2003 at paragraph 8

[99] In *Gonzales v. Oregon* 546 US 243 (2006) the Supreme Court ruled that the United States Attorney General could not enforce the federal Controlled Substances Act against physicians prescribing drugs for the assisted suicide of the terminally ill as expressly permitted by the Oregon Death With Dignity Act. The majority opinion of the court was delivered by Kennedy J. Roberts CJ, Scalia J. and Thomas J. filed dissenting opinions.

[100] See *Gonzales v. Carhart* 550 US _ (2007) where an (all Catholic) majority of Chief Justice John Roberts, Justice Antonin Scalia, Justice Anthony Kennedy, Justice Clarence Thomas, and Justice Samuel Alito upheld a federal criminal ban on "partial-birth" abortions against a facial constitutional challenge which provided as follows:

> "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)."

This decision marked the first time in which the Supreme Court has upheld a law regulating abortion availability which did not make an exception to preserve a woman's *health*, though the reasoning of Justice Kennedy apparently left open the possibility of an individual pregnant woman or her doctor making an "as applied" challenge to the law on the basis of the need for a health exception in her particular case.

[101] The five Catholic Justice are: Chief Justice Roberts, Justice Antonin Scalia, Justice Anthony Kennedy, Justice Clarence Thomas and Justice Samuel Alito. Of the remaining four Justices two are Jewish (Justice Ruth Bader Ginsburg and Justice Stephen Breyer), one Episcopalian (Justice David Souter) and one generic Protestant with no specific denominational affiliation (Justice John Paul Stevens).

[102] Ronald Dworkin "The Supreme Court Phalanx" (2007) 54 *New York Review of Books*, (Number 14 September 27, 2007), an essay re-published as Chapter 4 of his *The Supreme Court Phalanx: the court's new right-wing bloc* (New York: New York Review Books, 2008) at 47-48

[103] Congregation for the Doctrine of the Faith *Considerations regarding proposals to give legal recognition to unions between homosexual persons*, June 3, 2003 Paragraph 5

[104] The Pontifical Academy for Life *Moral Reflections on vaccines prepared from cells derived from aborted human foetuses*, 9 June 2005 has summarized the teaching approach thus:

> "*Formal cooperation* is carried out when the moral agent cooperates with the immoral action of another person, sharing in the latter's evil intention. On the other hand, when a moral agent cooperates with the immoral action of another person, without sharing his/her evil intention, it is a case of *material cooperation*.
>
> Material cooperation can be further divided into categories of *immediate* (direct) and *mediate* (indirect), depending on whether the cooperation is in the execution of the sinful action *per se*, or whether the agent acts by fulfilling the conditions - either by providing instruments or products - which make it possible to commit the immoral act. Furthermore, forms *of proximate cooperation* and *remote cooperation* can be distinguished, in relation to the 'distance' (be it in terms of *temporal* space or *material* connection) between the act of cooperation and the sinful act committed by someone else. *Immediate material cooperation* is always *proximate*, while *mediate material cooperation* can be either *proximate* or *remote*.
>
> *Formal cooperation* is always morally illicit because it represents a form of direct and intentional participation in the sinful action of another person. *Material cooperation* can sometimes be illicit (depending on the conditions of the 'double effect' or 'indirect voluntary' action), but when *immediate material cooperation* concerns grave attacks on human life, it is always to be considered illicit, given the precious nature of the value in question.
>
> A further distinction made in classical morality is that between *active* (or positive) cooperation in evil and *passive* (or negative) cooperation in evil, the former referring to the performance of an act of cooperation in a sinful action that is carried out by another person, while the latter refers to the omission of an act of denunciation or impediment of a sinful action carried out by another person, insomuch as there was a moral duty to do that which was omitted.
>
> Passive cooperation can also be formal or material, immediate or mediate, proximate or remote. Obviously, every type of formal passive cooperation is to be considered illicit, but even passive material cooperation should generally be avoided, although it is admitted (by many authors) that there is not a rigorous obligation to avoid it in a case in which it would be greatly difficult to do so."

[105] See Edward A. Hartnett "Catholic judges and co-operation in Sin" 4 *University of Saint Thomas Law Journal*.221 (2006)

[106] Reverend John D. Davis *The moral obligations of Catholic civil judges* (Washington DC: Catholic University of America Press, 1953) at pages 153-4:

> "If in the future euthanasia is legalised the judge may very well be confronted with the problem of its enforcement. According to the principles of Pius XII the duty of the Catholic judge is clear. He can have no active part in the enforcement of this intrinsically evil law. The judge may be acting only as a 'rubber stamp'. He may be granting a petition which the law demands he must grant if the conditions are fulfilled. Nevertheless he may not put his signature upon a petition or order requesting or commanding euthanasia. Responsibility rests on his shoulders and if by his action he puts the law into effect he becomes a formal co-operator in the intrinsic malice of mercy murder. Even though the judge does not associate himself with the evil content of the law and does not therefore will the death of the innocent person, his action of commanding the law to take its course amounts to formal co-operation in the evil done, for the judge by his action commands an act in itself intrinsically bad – opposed to the law of God and the Church – the killing of an innocent person. .... Should in the future a euthanasia law be passed and should the judge, despite the evil of it, co-operate in effecting the mercy killings by permitting or ordering the law to take its course, he sins against legal justice in improperly fulfilling his office and against the Fifth Commandment in permitting or directing murder. Both sins are mortal and the latter has the species of murder."

[107] See for example Reverend John D. Davis *The moral obligations of Catholic civil judges* (Washington DC: Catholic University of America Press, 1953) at pages 161:

"The federal judge may be faced with a case involving an interpretation of the present federal law [of 1873] relating to the prevention of contraception. Since this law is just and good, the judge is held to interpret it according to its true meaning. The obvious meaning of the federal law when enacted was to keep contraceptive devices and information from flooding the country and working grave harm to youth and the family. That is its true meaning today. Court decisions since 1930, however, have in effect set aside this true meaning. .... The result is that contraceptives today are working the harm the Congress of 1873 foresaw they would. If today a Catholic judge were faced with such a case he would be held to interpret the law so that in effect its obvious meaning would be attained and the nation-wide immoral use of contraceptive be thwarted. This he could do by interpreting the law literally and strictly or by deciding to what legitimate uses these devices could be put. *An examination of the law itself shows that it permits either interpretation. Should the judge therefore interpret it otherwise, that is according to previous court decisions, he sins in not properly fulfilling his office and cooperates in the furthering in society of a great moral evil opposed to the law of God and nature*. The judge's action is proximate material cooperation in the resulting sins, for which he here in this case has and can have no justifying reason since the law itself admits of a moral interpretation. In states which have laws prohibiting the sale of contraceptive devices and the giving of birth control information the judge should strive to protect the law against the numerous subterfuges of the protagonists of 'planned parenthood'."

[108] Reverend John D. Davis *The moral obligations of Catholic civil judges* (Washington DC: Catholic University of America Press, 1953) at pages 189:

"[W]hen the [Catholic] judge foresees that an attempted remarriage will certainly or probably take place after the divorce, his act of granting the divorce is closely tied up with the evil of remarriage, making that evil union legally possible. The judge's judgment become indirect and mediate material co-operation in the evil of this sin. According to the principles of material cooperation, the judge must have sufficiently weighty reasons for permitting the evil effect of remarriage. *The fact that should they refuse to grant the divorce, abuse and criticism would be heaped upon Catholic judges with loss of prestige, and the fact that they might be forced from office with resulting grave harm to an honest judiciary are considered sufficiently weight reasons for their giving the divorce decrees. .... In his own heart and mind* the Catholic judge remembers that in reality he is severing only the civil bond and that he has his own reasons of great weight for this action so closely allied with a possible invalid remarriage, *namely that should he refuse to grant it, the position of Catholic judges would become untenable in our land.*.

Compare and contrast with Justice Antonin Scalia "God's Justice and ours" *First Things* (May 2002) :

"I am aware of the ethical principle that *one can give 'material cooperation' to the immoral act of another when the evil that would attend failure to cooperate is even greater* (for example, helping a burglar tie up a householder where the alternative is that the burglar would kill the householder). I doubt whether that doctrine is even applicable to the trial judges and jurors who must themselves determine that the death sentence will be imposed. It seems to me these individuals are not merely engaged in 'material cooperation' with someone else' s action, but are themselves decreeing death on behalf of the state. The same is true of appellate judges in those states where they are charged with 'reweighing' the mitigating and aggravating factors and determining de novo whether the death penalty should be imposed: they are themselves decreeing death. Where (as is the case in the federal system) the appellate judge merely determines that the sentence pronounced by the trial court is in accordance with law, perhaps the principle of material cooperation could be applied. But as I have said, that *principle demands that the good deriving from the cooperation exceed the evil which is assisted. I find it hard to see how any appellate judge could find this condition to be met, unless he believes retaining his seat on the bench (rather than resigning) is somehow essential to preservation of the society-which is of course absurd*. (As Charles de Gaulle is reputed to have remarked when his aides told him he could not resign as President of France because he was the indispensable man: "*Mon ami*, the cemeteries are full of indispensable men.)

[109] See Bernard Häring SJ *The Law of Christ* (1963) at page 510:

"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."

See too Avery Cardinal Dulles, S.J., *Catholic Social Teaching and American Legal Practice*, 30 *Fordham Urban Law Journa*l 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."

[110] See Judge D'Army Bailey "The religious commitments of judicial nominees" 20 *Notre Dame Journal of .Law, Ethics & Public Policy* 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 [judicial by-passing of parental notification in cases in which a minor child seeks an abortion]."

[111] Congregation for the Doctrine of the Faith: Doctrinal Note *Regarding the participation of Catholic in Public Life* (November 2002) at paragraph 6

[112] Archbishop William J. Levada, *Reflections on Catholics in Political Life and the Reception of Holy Communion*, 34 *Origins* 101, 101-02 (July 1, 2004)

[113] See John T. Noonan *A Church than can and cannot change: the development of Catholic moral teaching* (Notre Dame, Indiana: University of Notre Dame Press, 2005). In the course of his critique of Noonan's claim that Church teaching under the papacy of John Paul has changed on the issue of slavery and that the Church now teaches unequivocally that slavery is an intrinsic evil see Avery Cardinal Dulles SJ "Development or Reversal? (2005) *First Things* (October 2005) makes the following historical summary:

> "Although the popes condemned the enslavement of innocent populations and the iniquitous slave trade, they did not teach that all slaves everywhere should immediately be emancipated. At the time of the Civil War, very few Catholics in the United States felt that papal teaching required them to become abolitionists. Bishop John England stood with the tradition in holding that there could be just titles to slavery. Bishop Francis P. Kenrick held that slavery did not necessarily violate the natural law. Archbishop John Hughes contended that slavery was an evil but not an absolute evil. Orestes Brownson, while denying that slavery was *malum in se*, came around to favor emancipation as a matter of policy.
>
> In 1863 John Henry Newman penned some fascinating reflections on slavery. A fellow Catholic, William T. Allies, asked him to comment on a lecture he was planning to give, asserting that slavery was intrinsically evil. Newman replied that, although he would like to see slavery eliminated, he could not go so far as to condemn it as intrinsically evil. For if it were, St. Paul would have had to order Philemon, "liberate all your slaves at once"." Newman, as I see it, stood with the whole Catholic tradition. In 1866 the Holy Office, in response to an inquiry from Africa, ruled that although slavery (*servitus*) was undesirable, it was not *per se* opposed to natural or divine law. This ruling pertained to the kind of servitude that was customary in certain parts of Africa at the time.
>
> No Father or Doctor of the Church, so far as I can judge, was an unqualified abolitionist. No pope or council ever made a sweeping condemnation of slavery as such. But they constantly sought to alleviate the evils of slavery and repeatedly denounced the mass enslavement of conquered populations and the infamous slave trade, thereby undermining slavery at its sources.."

[114] Code of Canon Law Canon 915:

> "Those who have been excommunicated or interdicted after the imposition or declaration of the penalty and others obstinately persevering in manifest grave sin are not to be admitted to holy communion."

[115] Code of Canon Law Canon 1321

> §1. No one is punished unless the external violation of a law or precept, committed by the person, is gravely imputable by reason of malice or negligence"

[116] Code of Canon Law Canon 1341

> "An ordinary is to take care to initiate a judicial or administrative process to impose or declare

penalties only after he has ascertained that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, reform the offender."

[117]Code of Canon Law Canon 1339

> "§1. An ordinary, personally or through another, can warn a person who is in the proximate occasion of committing a delict or upon whom, after investigation, grave suspicion of having committed a delict has fallen.
>
> §2. He can also rebuke a person whose behavior causes scandal or a grave disturbance of order, in a manner accommodated to the special conditions of the person and the deed.
>
> §3. The warning or rebuke must always be established at least by some document which is to be kept in the secret archive of the Curia."

[118] Code of Canon Law Canon 1347

> §1. A censure cannot be imposed validly unless the offender has been warned at least once beforehand to withdraw from contumacy and has been given a suitable time for repentance.
>
> §2. An offender who has truly repented of the delict and has also made suitable reparation for damages and scandal or at least has seriously promised to do so must be considered to have withdrawn from contumacy.

[119] See Gregory A. Kalscheur, S.J. "Catholics in Public Life: Judges, Legislators, and Voters" 46 *Journal of Catholic Legal Studies* 211 (2007) for an attempt to distinguish from the point of view of a moral theological assessment, the different responsibilities of judge and legislature

[120] *Re Monica Roa* Case D6122, Constitutional Court of Colombia, 10 May 2006

[121] See http://www.catholicnewsagency.com/new.php?n=6706. See, too, the *Freedom House* summary of subsequent developments in Colombia (at http://www.freedomhouse.org/uploads/ccr/country-7156-8.pdf):

> "In May 2006, the Constitutional Court decriminalized abortion in cases of rape, when the life or health of the woman was threatened, or when there was evidence that the foetus was deformed (Juan Forero, "Colombian Court Legalizes Some Abortions," *New York Times*, 12 May 2006, www.nytimes.com) Doctors performed the first legal abortion in Bogota in August 2006 on an eleven year-old who had been raped by her stepfather. This procedure was quickly condemned by the Roman Catholic Church. Pedro Rubiano, archbishop of Bogota, threatened to excommunicate any woman, doctor, or judge who practiced or facilitated abortion (Ricardo Arias Trujillo, "Sermón Permanente," *Semana*, 18–25 December 2006, www.semana.com/home.aspx) The government, meanwhile, issued a decree regulating abortion, stating that within the limits of the Court's ruling, any woman over fourteen could have the procedure without authorization ("Mayores de 14 años pueden abortar sin autorización," *El Espectador*, 14 December 2006, www.elespectador.com/elespectador)."

[122] See Justice Antonin Scalia "God's Justice and ours" *First Things* (May 2002)

> "[A] judge, I think, bears no moral guilt for the laws society has failed to enact. Thus, my difficulty with *Roe v. Wade* is a legal rather than a moral one: I do not believe (and, for two hundred years, no one believed) 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 the invalidation of laws that forbid abortion on demand: because the Constitution gives the federal government (and hence me) no power over the matter."

[123] *R (Daly) v Home Secretary* [2001] 2 AC 532 per Lord Steyn at 548

[124] Augustine of Hippo *De libero arbitrio voluntatis* (c. 395 CE) Book1 Chapter 6 translated by Anna S Benjamin L H Hackstaff as *On the free choice of the will* (Indianapolis: Bobbs-Merrill Co. Inc, 1964) at pages 13-14:

"Augustine: [I]f a nation is well-ordered and serious, a most watchful guardian of the common interest whose every citizen places the public good above his private interests, is not the law rightly made under which the people are allowed to elect magistrates of their own choice through whom their own welfare – that is the public welfare is administered ? ... Furthermore, if this same nation gradually becomes depraved, preferring private welfare to public welfare, buying and selling votes, being corrupted by men who love power, and finally turning its government over to evil men and criminals, isn't it right that at such time a good man, who is outstanding and has the greatest ability, should take the power of conferring offices form this people and reduce the government to a few noblemen or even to one ? ... Therefore although these two laws seem to be opposed to each other in tat the one gives to the people the power of conferring offices and the other takes it away, and although the second law is made so that both laws cannot exist at the same time in the same State, *still we would not say, would we, that either law is unjust and ought not to be in force* ? ... Therefore if you agree, let us call a law temporal when, although it is just, it can be justly changed in the course of time."

[125] Augustine of Hippo *De libero arbitrio voluntatis* (c. 395 CE) Book1 Chapter 4 translated by Anna S Benjamin L H Hackstaff as *On the free choice of the will* (Indianapolis: Bobbs-Merrill Co. Inc, 1964) at pages 9-10:

"Evodius: If to murder means to kill a man, murder can occur sometimes without sin. For when a solider kills and enemy or the judge or official puts a criminal to death, or when, by chance, a man unwittingly lets a weapon escape from his hand, I do not think that these men sin when they slay a man.

Augustine: I agree. Yet these men are not usually called murderers. Answer this then: do you think that a man who kills a master from whom he fears severe tortures is to be considered one of those men who, although they have killed, do not deserve the name of murderer ?

Evodius: I see that this is quite a different case. For the former man acts either according to the law or not contrary to the law; while the crime of the man who slays his master because of his fear of punishments is not approved by any law.

Augustine: Again you bring me back to authority. But you must remember that we have undertaken this study now so as to understand what we believe in. We do believe in law, so we must try somehow, if we can, to understand the following question: may not the law which punishes this deed punish it wrongly.

Evodius: The law is not at all wrong to punish the man who wilfully and knowingly murders his master. None of the others in our example did that.

...

Augustine: [W]hen a master is killed by a slave because of the slave's desire to live without fear, he is not slain by a desire worthy of blame. Thus we have not yet discovered why this deed is evil. For we agreed that evil deeds are evil for no other reason except that they are done through lust, that is through blameworthy desire.

Evodius: At this point, the man who killed his master seems to be condemned unjustly. Yet I would not dare say this had I any other answer.

Augustine: Is it not like this, that you persuaded yourself such a great crime should be unpunished before you considered whether the slave desired to be free of the fear of his master only to satisfy his own lusts ?"

[126] Augustine of Hippo *De libero arbitrio voluntatis* (c. 395 CE) Book1 Chapter 5 translated by Anna S Benjamin L H Hackstaff as *On the free choice of the will* (Indianapolis: Bobbs-Merrill Co. Inc, 1964) at pages 11-12.

"Augustine: [On your argument] the law is not just which grants a traveler the power to kill a highway robber so that he himself may not be killed; or which grants a man or woman the right to slay, if they can, an assailant before he can do violence. Indeed the law even commands a solider to kill the enemy, and if the solider refrains from the slaughter, he is punished by his commander. We shall not, shall we, dare say that these laws are unjust – or rather are not laws at all, for I think that a law that is not just is not a law.

Evodius: Surely, I think that a law is quite safe from this accusation if it permits the people it rules to do lesser evils so as to avoid greater ones. …. But even though the law is blameless, I do not understand how these men can be, when the law does not force them to kill, but leaves it in their power. They are free not to kill anyone for those things which they can lose against their will, and which they

ought not therefore to love. … Thus, I do not blame the law which permits such aggressors to be slain yet I do not know how I would defend the man who kills."

[127] See to similar effect Thomas Aquinas *Summa Theologiae* (c. 1265-1274 CE) Ia-IIae q. 96, art. 2:

"[H]uman law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain but only the more grievous vices, from which it is possible for the majority to abstain; and *chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained*: thus human law prohibits murder, theft and suchlike."

[128] Augustine of Hippo *De libero arbitrio voluntatis* (c. 395 CE) Book1 Chapter 5 translated by Anna S Benjamin L H Hackstaff as *On the free choice of the will* (Indianapolis: Bobbs-Merrill Co. Inc, 1964) at pages 12-13.

[129] See Pelagius (or unknown Pelagian disciple) *De Divitiis* (On riches) (c. 400 CE) at Book 6 Chapter 2-3:

"2. .... The rich in that vainglorious and proud spirit in which they covet for themselves the glory of this world are sometime accustomed to solicit earthly power and sit upon that tribunal before which Christ stood and was heard. How intolerable is this presumption of human pride ! You may see the servant sitting where the master stood, and judging where he was judged. What is this, Christian ? What is this, disciple of Christ ? This is not the pattern given you by your teacher. *He* stood humbly before the tribunal; *you* sit on the tribunal, above those who stand before you, propped up by your pride, perhaps about to judge a poor man. *You* ask the questions; *he* was heard. *You* judge; *he* was subjected to the judge's decision. In your presumption , *you* utter your judgment; in his innocence, *he* received it, as if guilty. *He* said that his kingdom was not of this world; but to *you* the glory of the worldly kingdom is so desirable that you procure it at vast expense or acquire it with unworthy and wearisome servitude and flattery.

3. And all the time you convince yourself that it is from God that you receive what in fact you either procure from your ill-gotten gains or acquire at a price of shameful sycophancy and oft-repeated acts of obeisance, bowing your head to the ground and addressing as 'Lord' one whom you scorn, while he the trafficker in offices also scorns you. And sometimes you glory in being called 'honourable' though the only true honour is that paid to moral character not that acquired by money or shameful servitude."

[130] See Priscus of Panium *Fragments* 8 (c. 449 CE) translated in C.D. Gordon *The age of Attila: fifth-century Byzantium and the Barbarians* (New York: Dorset Press, 1992)at 87:

"If the transgressor of the law be of the monied class, it is not likely that he pays the penalty for his wrongdoing. Whereas if the transgressor should be poor and ignorant of how to handle the business, he endures the penalty according to the law – if he does not depart life before his trial. For the course of these cases is long protracted, and a great deal of money is expended on them. No-one will ever grant a court to a wronged man unless he lay aside some money for the judge and his retinue."

[131] See Saint Augustine of Hippo *The City of God* (c. 410 CE) Book 19 Chapter 6:

"[J]udges are men who cannot discern the consciences of those at their bar, and are therefore frequently compelled to put innocent witnesses to the torture to ascertain the truth regarding the crimes of other men. What shall I say of torture applied to the accused himself? He is tortured to discover whether he is guilty, so that, though innocent, he suffers most undoubted punishment for crime that is still doubtful, not because it is proved that he committed it, but because it is not ascertained that he did not commit it. Thus the ignorance of the judge frequently involves an innocent person in suffering. And what is still more unendurable … is this, that when the judge puts the accused to the question, that he may not unwittingly put an innocent man to death, the result of this lamentable ignorance is that this very person, whom he tortured that he might not condemn him if innocent, is condemned to death both tortured and innocent. For if he has chosen, in obedience to the philosophical instructions to the wise man, to quit this life rather than endure any longer such tortures, he declares that he has committed the crime which in fact he has not committed. And when he has been condemned and put to death, the judge is still in ignorance whether he has put to death an innocent or a guilty person, though he put the accused to the torture for the very purpose of saving himself from condemning the innocent; and consequently he has both tortured an innocent man to discover his innocence, and has put him to death without discovering it. If such darkness shrouds social life, will a wise judge take his seat on the bench or no? Beyond question he will. For human society, which he thinks it a wickedness to abandon,

constrains him and compels him to this duty. And he thinks it no wickedness that innocent witnesses are tortured regarding the crimes of which other men are accused; or that the accused are put to the torture, so that they are often overcome with anguish, and, though innocent, make false confessions regarding themselves, and are punished; or that, though they be not condemned to die, they often die during, or in consequence of, the torture; or that sometimes the accusers, who perhaps have been prompted by a desire to benefit society by bringing criminals to justice, are themselves condemned through the ignorance of the judge, because they are unable to prove the truth of their accusations though they are true, and because the witnesses lie, and the accused endures the torture without being moved to confession. These numerous and important evils he does not consider sins; for the wise judge does these things, not with any intention of doing harm, but because his ignorance compels him, and because human society claims him as a judge. But though we therefore acquit the judge of malice, we must none the less condemn human life as miserable. And if he is compelled to torture and punish the innocent because his office and his ignorance constrain him, is he a happy as well as a guiltless man? Surely it were proof of more profound considerateness and finer feeling were he to recognize the misery of these necessities, and shrink from his own implication in that misery; and had he any piety about him, he would cry to God 'From my necessities deliver me'."

[132] See Pelagius (or unknown Pelagian disciple) *De Divitiis* (On riches) (c. 400 CE) at Book 6 Chapters 3

"3. .... Before your eyes human bodies of like nature to yours are battered with a scourge of lead or broken with cudgel or torn apart with claws or burnt in the flames. Yet all this your holy eyes can bear to witness and your Christian disposition permits you to watch – and not only to watch but even to exercise the authority given by your exalted rank and administer the torture yourself in the place of the executioner. I find the spectator quite loathsome enough; what am I now to say of one who gives the orders ? Reflect with me, earthly judge, does some hardening of the heart render you immune and exempt from the suffering endured by one who is of the same nature as yourself or does the pain of his human body somehow fail to penetrate to the feelings of your human heart ?"

[133] Kevin Uhalde *Expectations of Justice in the Age of Augustine* (Philadelphia: University of Pennsylvania Press, 2007) at 24

[134] Robert George "Natural Law, the Constitution and the theory and practice of judicial review" 69 *Fordham Law Review* 2269, 2283 (2000-2001)

[135] Pope Pius XII "Duties of Catholic jurists" 6 November 1949 reprinted in Reverend John D. Davis *The moral obligations of Catholic civil judges* (Washington DC: Catholic University of America Press, 1953) 217 at 223

[136] See, to like effect, John Paul II "Address to the Italian Association of Judges" (31 March 2000), 4:

"In defining the proper relationship between the legislative, executive and judicial powers, the Constitutions of modern States guarantee the judicial power the *necessary independence* in the realm of law."

[137] *Francôme v. Mirror Group of Newspapers Ltd.* [1984] All ER 415 *per* Sir John Donaldson MR at 412h-413b:

"Parliamentary democracy as we know it is based on the rule of law. That requires all citizens to obey the law unless and until it can be changed by due process. … The right to disobey the law is not obtainable by the payment of a penalty or licence fee. It is not obtainable at all in a parliamentary democracy, although different considerations arise under a totalitarian regime.

In saying this, I nevertheless recognise that, *in very rare circumstances, a situation can arise in which the citizen is faced with a conflict between what is, in effect, two inconsistent laws. The first law is the law of the land. The second is a moral imperative … Yielding to the moral imperative does not excuse a breach of the law of the land, but it is understandable and in some circumstances may even be praiseworthy*."

[138] Compare, too, with the *Catechism of the Catholic Church* at paragraph 2036:

"Those who renounce violence and bloodshed and, in order to safeguard human rights, make use of those means of defence available to the weakest, bear witness to evangelical charity, provided that they do so without harming the rights and obligations of other men and societies. They bear legitimate

witness to the gravity of the physical and moral risk of recourse to violence, with all its destruction and death."

[139] Thus in *Centesimus Annus* (1991) Pope John Paul II stated (at paragraph 47):

> "[T]oday we are witnessing a predominance, not without signs of opposition, of the democratic ideal, together with lively attention to and concern for human rights. But for this very reason it is necessary for peoples in the process of reforming their systems to give democracy an authentic and solid foundation through the explicit recognition of those rights. *Among the most important of these rights, mention must be made of the right to life, an integral part of which is the right of the child to develop in the mother's womb from the moment of conception; the right to live in a united family and in a moral environment conducive to the growth of the child's personality; the right to develop one's intelligence and freedom in seeking and knowing the truth; the right to share in the work which makes wise use of the earth's material resources, and to derive from that work the means to support oneself and one's dependents; and the right freely to establish a family, to have and to rear children through the responsible exercise of one's sexuality. In a certain sense, the source and synthesis of these rights is religious freedom, understood as the right to live in the truth of one's faith and in conformity with one's transcendent dignity as a person*."

[140] Thus the Pontifical Council for Justice and Peace *A Compendium of the Social Doctrine of the Church* (2004) states at paragraph 169:

> "[I]n the democratic State, where decisions are usually made by the majority of representatives elected by the people, those responsible for government are required to interpret the common good of their country not only according to the guidelines of the majority but also according to the effective good of all the members of the community, including the minority."

[141] C.f. Richard John Neuhaus *The Best of the Public Square – Book 2* (2001) in "Encountered by the Truth" at pages 177, 178-179:

> "The dismal truth is that generations of moderns were miseducated to think that religion, and Christianity in particular, claims to be 'objectively' true in a manner that eliminates the subjectivity of experience and perspective. Regrettably that miseducation was and is abetted by Christians who confuse orthodoxy with the exclusion of intellectual inquiry. In this habit of mind the truth is an object, a thing possessed, which must be assiduously protected from any thought that is not certified by Christian copyright. The alternative is to understand that truth is personal, less a matter of our possessing than of our being possessed in service to the one who is the way the truth and the life. As St. Paul reminds the Corinthians, our apprehension of that truth is always partial, something seen through a glass darkly in anticipation of the time when we will know even as we are known.
>
> Few things have contributed so powerfully to the unbelief of the modern and post-modern world as the pretension of Christians to know more than we do. In reaction to unwarranted claims of knowledge certain and complete, modern rationalists constructed their religion of scientism, and post-moderns, in reaction to both claim that nothing can be known
> .[…]
> If Christians exhibited more intellectual patience, modesty, curiosity and sense of adventure, there would be fewer atheists in the world, both of the modern rationalist and post-modern irrationality varieties. I have never met an atheist who rejects the God in whom I believe. I have met many who decline to commit intellectual suicide, and maybe spiritual suicide as well, by accepting a God proposed by Christians who claim to know more than they can possibly know."

[142] See *Gaudium et spes: the pastoral constitution on the Church in the modern* world, promulgated by Pope Paul VI on 7 December 1965 at paragraph75:

> "[T]he people who come together in the political community are many and diverse, and *they have every right to prefer divergent solutions. If the political community is not to be torn apart while everyone follows his own opinion, there must be an authority to direct the energies of all citizens toward the common good, not in a mechanical or despotic fashion, but by acting above all as a moral force which appeals to <u>each one's freedom and sense of responsibility</u>.*

It is clear, therefore, that the political community and public authority are founded on human nature and hence belong to the order designed by God, *even though the choice of a political regime and the appointment of rulers are left to the free will of citizens.*

It follows also that political authority, both in the community as such and in the representative bodies of the state, must always be exercised within the limits of the moral order and directed toward the common good-with a dynamic concept of that good-according to the juridical order legitimately established or due to be established. *When authority is so exercised, citizens are bound in conscience to obey. Accordingly, the responsibility, dignity and importance of leaders are indeed clear.*

But where citizens are oppressed by a public authority overstepping its competence, they should not protest against those things which are objectively required for the common good; but it is legitimate for them to defend their own rights and the rights of their fellow citizens against the abuse of this authority, *while keeping within those limits drawn by the natural law and the Gospels.*"

[143] See Archbishop Raymond Burke *On Our Civic Responsibility for the Common Good* (October 2004) published at www.archstl.org/letters/100104pastoral_letter.pdf paragraphs 2, 3:

"[S]ome months ago … another native of Germany, who grew up during the Third Reich commented to me on the accusation made against a number of Catholic bishops of Germany of the time of not having done enough to teach against the evils of Nazism.

…

I think how much weightier the individual responsibility for the common good is in a democratic republic like our own nation, in which we elect the officials of our Government. As a Bishop I think of the tremendous responsibility which is mine to teach clearly the moral law to all the faithful so that, in turn, we all have a clear understanding of our civic responsibility for the common good."

[144] The *Catechism of the Catholic Church* makes the following assertions at paragraphs 2242-2243:

"When citizens are under the oppression of a public authority which oversteps its competence, they should still not refuse to give or to do what is objectively demanded of them by the common good; but *it is legitimate for them to defend their own rights and those of their fellow citizens against the abuse of this authority within the limits of the natural law and the Law of the Gospel.*

Armed *resistance* to oppression by political authority is not legitimate, unless all the following conditions are met: 1) there is certain, grave, and prolonged violation of fundamental rights; 2) all other means of redress have been exhausted; 3) such resistance will not provoke worse disorders; 4) there is well-founded hope of success; and 5) it is impossible reasonably to foresee any better solution."

[145] The different roles of legislators and judges are alluded to by Augustine of Hippo and Thomas Aquinas respectively in the following ways. Saint Augustine of Hippo states in *De Vera Religione* (*On the true religion*) (c. 390 CE) at xxxi, 58:

"In these earthly laws, though men judge about them when they are making them, when once they are established and passed, the judges may judge no longer of them, but according to them. An earthly legislator, if he is an honest and wise man, is inspired by the eternal law (which none can judge) founding on its unchangeable prescriptions so as to establish what should be required or forbidden, depending on the circumstances. Pure souls are permitted to know the eternal law, but not to judge it. And the difference is precisely this: to know a thing it is sufficient to observe if it is in a given mode or not; in judging on the other hand, we add something, meaning that it could have been different, as when we say in the manner of artists before their works of art: 'so it has to be, so it had to be; so it will have to be'."

his *Summa Theologiae* (c. 1265-1274 CE), Thomas Aquinas makes the following pertinent observations on the proper (Aristotelian) relationship between judges and legislators (at IaIIae q. 95,1 resp 2-3):

"As Aristotle says (in *Rhetoric* I, I. I354a31), 'it is better that all issues be regulated by law than to be left to the decision of judges'. Three reasons may be given:

first, because it is easier to find the few wise persons who suffice to frame rightful laws than the many to judge aright about every single case;

secondly, because framing the law allows for a long time during which to ponder over what they should enforce, whereas judgments on particular facts are abut cases which suddenly

blow up. It is easier to see what is right by taking many cases into consideration than by relying on one solitary case

thirdly, because lawgivers judge on the general lie of the land and with an eye to the future, whereas judges have to decide on the cases before them, about which they can be affected by love or hate or some partiality, and this can impair their judgment.

[It is better, wherever possible, to draw up laws on matters to be judged and to leave as little as possible to individual discretion. As Aristotle also notes (in *Rhetoric* I, I. I354b13), some individual features, which cannot be covered by general laws have to be left to judges, such as questions of fact and the like."

The Aristotelian approach to judging is one in which the consistency and coherence of the overall system of rules is regarded as being of paramount importance. It is in following and respecting the structures and procedures of the law as laid down that justice is done and achieved, not in the particular result in the particular case.

[146] *Gaudium et Spes - the Pastoral Constitution on the Church in the Modern World* (1965) at paragraph 75

[147] John Henry Newman *Letter to the Duke of Norfolk* (1874) at Section 5. Available on-line at www.newmanreader.org/works/anglicans/volume2/gladstone/section5.html.

"[C]onscience is not a judgment upon any speculative truth, any abstract doctrine, but bears immediately on conduct, on something to be done or not done. 'Conscience,' says St. Thomas, 'is the practical judgment or dictate of reason, by which we judge what *hic et nunc* is to be done as being good, or to be avoided as evil.

[…]

[C]onscience being a practical dictate, a collision is possible between it and the Pope's authority only when the Pope legislates, or gives particular orders, and the like. *But a Pope is not infallible in his laws, nor in his commands, nor in his acts of State, nor in his administration, nor in his public policy. Let it be observed that the [First] Vatican Council has left him just as it found him here.*

[…]

*Since then infallibility alone could block the exercise of conscience, and the Pope is **not** infallible in that subject-matter in which conscience is of supreme authority, no deadlock … can take place between conscience and the Pope.* … [I]ts dictate, in order to prevail against the voice of the Pope, must follow upon serious thought, prayer, and all available means of arriving at a right judgment on the matter in question.

[…]

Cardinal Gousset has adduced from the Fourth Lateran [Council]; that 'He who acts against his conscience loses his soul.' … Of course, if a man is culpable in being in error, which he might have escaped, had he been more in earnest, for that error he is answerable to God, but still he must act according to that error, while he is in it, because he in full sincerity thinks the error to be truth

[…]

I add one remark. Certainly, if I am obliged to bring religion into after-dinner toasts, (which indeed does not seem quite the thing) I shall drink 'the Pope', if you please, still, 'to Conscience first, and to the Pope afterwards'."

In *Veritatis Splendor* (1993) at paragraph 33 Pope John Paul II refers to Cardinal Newman as an "outstanding defender of the rights of conscience" and quotes approvingly from Newman's *Letter to the Duke of Norfolk.*

[148] *Gaudium et Spes - the Pastoral Constitution on the Church in the Modern World* (1965) states at Article 16:

"In the depths of his conscience, man detects a law which he does not impose upon himself, but which holds him to obedience. Always summoning him to love good and avoid evil, the voice of conscience when necessary speaks to his heart: do this, shun that. For man has in his heart a law written by God; to obey it is the very dignity of man; according to it he will be judged. Conscience is the most secret core and sanctuary of a man. There he is alone with God, Whose voice echoes in his depths. In a wonderful manner conscience reveals that law which is fulfilled by love of God and neighbor. *In fidelity to conscience, Christians are joined with the rest of men in the search for truth, and for the genuine solution to the numerous problems which arise in the life of individuals from social relationships. Hence the more right conscience holds sway, the more persons and groups turn aside from blind choice and strive to be guided by the objective norms of morality. Conscience frequently errs from invincible ignorance without losing its dignity*. The same cannot be said for a man who cares

but little for truth and goodness, or for a conscience which by degrees grows practically sightless as a result of habitual sin."

[149] Fr. Joseph Ratzinger on "The Dignity of the Human Person" in Herbert Vorgrimler (ed.) *Commentary on the Doctrine of Vatican II*, volume V - concerning The Pastoral Constitution on the Church in the Modern World - Part I Chapter 1 at pages 134-136

[150] Thomas Aquinas certainly envisages a distinction between a judge's private and his public official persona. In his discussion of whether it might ever be lawful to kill the innocent (*Summa Theologiae* IIaIIae q. 64 a. 6 (c. 1265-1274 CE)) he (somewhat controversially) opines:

> "[S]ometimes a man is forced, according to the order of justice, to slay an innocent person: for instance, when a judge, who is bound to judge according to the evidence, condemns to death a man whom he knows to be innocent but who is convicted by false witnesses; and again the executioner, who in obedience to the judge puts to death the man who has been unjustly sentenced. … If the judge knows that man who has been convicted by false witnesses, is innocent he must, like Daniel, examine the witnesses with great care, so as to find a motive for acquitting the innocent: but if he cannot do this he should remit him for judgment by a higher tribunal. If even this is impossible, he does not sin if he pronounce sentence in accordance with the evidence, for it is not he that puts the innocent man to death, but they who stated him to be guilty. He that carries out the sentence of the judge who has condemned an innocent man, if the sentence contains an inexcusable error, he should not obey, else there would be an excuse for the executions of the martyrs: if however it contain no manifest injustice, he has no right to discuss the judgment of his superior; nor is it he who slays the innocent man, but the judge whose minister he is."

The internal wall of separation between private and public knowledge is repeated in *Summa Theologiae* (c. 1265-1274 CE) IIaIIae q. 67 a. 2 where in discussing the issue of whether it is lawful for a judge to pronounce judgment against the truth that he knows, on account of evidence to the contrary, Aquinas states:

> As stated above (1; 60, 2,6) it is the duty of a judge to pronounce judgment in as much as he exercises public authority, wherefore his judgment should be based on information acquired by him, not from his knowledge as a private individual, but from what he knows as a public person. Now the latter knowledge comes to him both in general and in particular --in general through the public laws, whether Divine or human, and he should admit no evidence that conflicts therewith--in some particular matter, through documents and witnesses, and other legal means of information, which in pronouncing his sentence, he ought to follow rather than the information he has acquired as a private individual. And yet this same information may be of use to him, so that he can more rigorously sift the evidence brought forward, and discover its weak points. If, however, he is unable to reject that evidence juridically, he must, as stated above, follow it in pronouncing sentence. …. In matters touching his own person, a man must form his conscience from his own knowledge, but in matters concerning the public authority, he must form his conscience in accordance with the knowledge attainable in the public judicial procedure."

[151] *West Virginia State Board. of Education v. Bamette*, 319 U.S. 624, 646-67 (1943) (Frankfurter, J., dissenting). His opinion continues:

> "Responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered"

[152] See William Pryor "The Religious faith and judicial duty of an American Catholic Judge" (2006) 24 *Yale Law and Policy Review* 347 for argument to the effect that the Catholic judge should apply the law without reference to private moral views.

[153] See Diarmuid F. O'Scannlain "Must a faithful judge be a faithless judge ?" 4 *University of Saint Thomas Law Journal.*157 at 164 (2006)

[154] 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.)

[155] 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.)

[156] Letter from Robert George to Sandford Levinson 3 April 1990 quoted in Sanford Levinson, "The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices", 39 *DePaul Law Review* 1047, 1076 (1990) at footnote 85 (emphases added). See too Robert George *In defence of natural law* (Oxford: Oxford University Press, 1999) Chapter 5 "Natural Law and Positive law" at pages 110-111:

> "Natural law theory … does not imagine that the judge enjoys (or should enjoy) as a matter of natural law a plenary authority to substitute is own understanding of requirements of the natural law for the contrary understanding of the legislator or constitution maker in deciding cases at law. On the contrary for the sake of the Rule of Law, understood as ordinarily a necessary (albeit not a sufficient) condition for a just system of government, the judge … is morally required (that is obligated as a matter of natural law) to respect the limits of his own authority as has been allocated to him by way of an authoritative *determinatio* … To the extent that judges are not given power under the Constitution to translate principles of natural law into positive law, that power is not one they enjoy; nor is it one they may justly exercise. For judges to arrogate such power to themselves in defiance of the Constitution is not merely for them to exceed their authority under the positive law; It is to violate the very natural law in whose name they purport to act."

[157] See too Robert George "Natural Law, the Constitution and the theory and practice of judicial review" 69 *Fordham Law Review* 2269, 2279 (2000-2001):

> "If we see that natural law does not dictate an answer to the question of its own enforcement, it is clear that authority to enforce the natural law may reasonably be vested, or even virtually exclusively, with the legislature; or alternatively a significant measure of such authority may be granted to the judiciary as a check on legislative power. The question whether to vest courts with the power of constitutional judicial review at all and if so, what the scope of that power should be is in important ways underdetermined by reason. As such, it is a matter to be resolved prudently, by the type of authoritative choice *among morally acceptable option*s, what Aquinas called '*determinatio*' and distinguished from maters that could be resolved by a process akin to deduction from the natural law itself."

This analysis itself begs the question as to whether judicial non-interference (on the basis of their constitutional impotence or subordination) in the face of gross legislative injustice is in fact a *morally acceptable option*s both of the individual judge and for the judicial institution serving and seeking to uphold a just society. To make his case for the compatibility of his "natural law" theory with such judicial quietism, Professor George would have to show that the result therefrom was indeed a morally acceptable option, rather than assume it.

[158] See for example the theory of constitutional interpretation espoused by Justice Holmes in *Missouri. v. Holland*, 252 U.S. 416, 433 (1920):

> "When we are dealing with words that also are a constituent act, like the Constitution of the United States, *we must realize that they [the words of the Constitution] have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism*; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

[159] See Justice Antonin Scalia "God's Justice and ours" *First Things* (May 2002)

[160] See *Yearbook of the International Law Commission*, 1950, Vol. II, pp. 374-378, setting out and commenting upon among others Nuremberg Principle IV::

> "The fact that a person acted in pursuance of an order of his Government or of a superior does not relieve him of responsibility [for, *inter alia*, crimes against humanity] under international [humanitarian] law, provided a moral choice was open to him"

And Nuremberg Principle VII:

> "Complicity in the commission of ... a crime against humanity ... is a crime under international law."

[161] Compare Justice Scalia's opinion announcing the judgment of the Court in *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n. 6 (1989):

> Because .... general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. The need, if arbitrary decision-making is to be avoided to ... at least announce, as Justice Brennan declines to do, some other criterion for selecting among the innumerable

relevant traditions that could be consulted. ... Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all."

with Justice Brennan's dissent (with whom Justice Marshall and Justice Blackmun joined) in *Michael H.*, 491 U.S. at 141:

"It is ironic that an approach [of the plurality] so utterly dependent on tradition is so indifferent to our precedents. ... The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold"

[162] James Fleming in "Fidelity to Natural law and natural rights in constitutional interpretation" 69 *Fordham Law Review* 2285, 2287-8 (2000-2001) suggests that Robert George's position is, at heart, one determined by his (conservative) politics rather than by natural law theory, noting:

"He claims that it is possible to believe that the constitution does embody natural law or natural rights, and still agree with [Justice] Black that judges have no authority to enforce natural law or natural rights against legislative encroachment ... Why would George adopt this argument ? It appears that he has made the prudential, that is political, judgment that it is worth doing in order to damn *Griswold [v. Connecticut], Roe v. Wade* and *Casey v. Planned Parenthood* as illegitimate instances of *Lochner* style natural-law judging."

[163] Joseph W. Koterski SJ "Response to Robert George "Natural Law, the Constitution and the theory and practice of judicial review" 69 *Fordham Law Review* 2297, 2299 (2000-2001). See, in reply, Robert George "The Natural Law due process philosophy" 69 *Fordham Law Review* 2301, 2301 (2000-2001):

"Father Koterski and I agree more than we disagree"

[164] See to similar effect Stephen Smith "Cultural Change and Catholic Lawyers" 1 *Ave Maria Law Review* 31, 45 (2003):

"I disagree with Cardinal George's apparent suggestion [made in "Culture and Laws" 1 *Ave Maria Law Review* 1, 17 (2003)] that Catholic judges should use their judicial offices to prevent or strike down practices that, though permissible as a matter of law are deemed immoral by the Church. The proper course for judges is to follow the law in the cases that come before them, mindful always of their duty to recuse in the event the law would require them to perform an intrinsically evil act, co-operate with evil in a manner which is morally impermissible, or take action that would scandalise others. The judge who does this is simultaneously faithful to his judicial oath of office, the Constitution and laws from which he derives his authority, and his moral duties."

[165] See in similar vein Judge Michael Merz "The Conscience of a Catholic judge" 29 *University of Dayton Law Review* 305, 308 (2003-2004):

"I was raised as a Catholic to understand that formation of conscience required study of the tradition and deep reflection on the ethical dilemmas in which one found oneself. Mere intuitive or instinctive reaction to a situation was insufficient, because human judgment is easily led astray by bias or desire. *Mere deference to authority, even papal authority, was insufficient, because the natural law was man's rational participation in God's eternal law and one must think, not just defer, in order to be fully rational.* And all of one's acts are subject to the judgment of conscience. Although a judge may have special moral obligations because of his or her social role as a judge, he or she is not exempted by that role from the demands of conscience."

[166] *Catechism of the Catholic Church* at paragraph 1781:

"Conscience enables one to assume *responsibility* for the acts performed. If man commits evil, the just judgment of conscience can remain within him as the witness to the universal truth of the good, at the same time as the evil of his particular choice. The verdict of the judgment of conscience remains a pledge of hope and mercy. In attesting to the fault committed, it calls to mind the forgiveness that must be asked, the good that must still be practiced, and the virtue that must be constantly cultivated with the grace of God"

[167] *Catechism of the Catholic Church* at paragraph 1798:

"A well-formed conscience is upright and truthful. It formulates its judgments according to reason, in conformity with the true good willed by the wisdom of the Creator. Everyone must avail himself of the means to form his conscience."

[168] See, to similar effect, the Pontifical Council for Justice and Peace *A Compendium of the Social Doctrine of the Church* (2004) at paragraph 78:

"A significant contribution to the Church's social doctrine comes also from human sciences and the social sciences. In view of that particular part of the truth that it may reveal, no branch of knowledge is excluded. The Church recognizes and receives everything that contributes to the understanding of man in the ever broader, more fluid and more complex network of his social relationships. It is aware of the fact that a profound understanding of man does not come from theology alone, without the contributions of many branches of knowledge to which theology itself refers."

[169] *Catechism of the Catholic Church* at paragraph 1790:

"A human being must always obey the certain judgment of his conscience. If he were deliberately to act against it, he would condemn himself."

[170] As is stated, too, in *Veritatis Splendor* (1993) at paragraph 44:

"[O]bedience to God is not, as some would believe, a *heteronomy, as if the moral life were subject to the will of something all-powerful, absolute, extraneous to man and intolerant of his freedom*. If in fact a heteronomy of morality were to mean a denial of man's self-determination or the imposition of norms unrelated to his good, this would be in contradiction to the Revelation of the Covenant and of the redemptive Incarnation. Such a heteronomy would be nothing but a form of alienation, contrary to divine wisdom and to the dignity of the human person."

[171] *Gaudium et Spes* (7 December 1965) at Article 17

[172] See Sanford Levinson, "The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices", 39 *DePaul Law Review* 1047, 1048 (1990) which notes the positions taken by Justice William Brennan, Antonin Scalia and Anthony Kennedy on their respective nominations to the Supreme Court in which they expressly disavow the suggestion that their Catholic faith might impact upon their judicial decision making.

[173] Text reported in full *New York Times*, 13 September 1960. See, too, Mario Cuomo "Religious Belief and Public Morality: A Catholic Governor's Perspective" 1 *Notre Dame Journal of .Law, Ethics & Public Policy* 13 (1984)