

Conscience, the Constitution, and the Role of the Catholic Judge

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A year ago at this time, legal and political commentators were embroiled in a lively discussion of the Catholic faith of Judge John Roberts, who had just been nominated to serve as a justice on the Supreme Court. The controversy was sparked by a Los Angeles Times column in which Professor Jonathon Turley of the George Washington University Law School described a conversation that took place between Judge Roberts and another Catholic public official, Senator Richard Durbin of Illinois. Senator Durbin is said to have asked Judge Roberts the following question: “what would [you] do if the law required a ruling that [the Catholic] church considers immoral?” Professor Turley described Judge Roberts’ response in these words: “Renowned for his unflappable style in oral argument, Roberts appeared nonplused and, according to sources in the meeting, answered after a long pause that he would probably have to recuse himself.”¹

Turley went on to characterize Roberts’ response as “the wrong answer” to Durbin’s question. The answer was wrong, Turley explained, because “[i]n taking office, a justice takes an oath to uphold the Constitution and the laws of the United States. A judge’s personal religious views should have no role in the interpretation of the laws.”² Turley gave Roberts credit for not saying that his

¹ Jonathan Turley, *The Faith of John Roberts*, L.A. TIMES, July 25, 2005, at B11.

² *Id.*

faith would control his legal judgment in the sort of case Durbin proposed, but he did express the fear that, “if [Roberts’] were to recuse himself on such issues as abortion and the death penalty, it would raise the specter of an evenly split Supreme Court on some of the nation’s most important cases.”³ While Senator Durbin’s office has disputed the accuracy of Turley’s description of the conversation,⁴ Turley’s account of Durbin’s question and Roberts’ response fueled debate across the political spectrum about the proper relationship between Roberts’ faith and judicial decision making in the weeks leading up to the Roberts confirmation hearing.

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

But contrary to the position taken by Professor Turley, I think John Roberts gave the right answer to Senator Durbin’s question. Judges whose judicial role requires them to perform an action in a particular case that their

³ *Id.*

⁴ See David D. Kirkpatrick, *Skirmish Over a Query About Roberts’s Faith*, N.Y. TIMES, July 26, 2005, at A13.

religiously informed conscience tells them is immoral might indeed have to recuse themselves.⁵ When a judge's moral obligation to avoid culpable cooperation with evil prevents the judge from doing something that the law requires be done in a particular case, then the judge's legal obligation to discharge his duties impartially directs him to disqualify himself from participating in the case. At the same time, I don't believe that these general principles, properly understood, lead to the troublesome consequences that Professor Turley seems to imagine. We shouldn't too quickly assume that there are a large number of situations in which a Catholic judge's fidelity to his or her conscience will require the judge to refuse to fulfill their judicial duties in a particular case, and I think it's highly unlikely that such a situation will present itself in the context of Supreme Court adjudication.

The analysis that leads me to this conclusion moves through three steps. In the first part of my presentation this evening, I'll try to provide some of the context behind the controversy over John Roberts' Catholicism. In particular, I want to focus attention on a critical distinction that is often overlooked in debates about the place of faith in public life: the distinction between the role of a legislator and the role of a judge. The second part of my talk will briefly discuss the framework of moral analysis that we should use to assess whether there is a conflict between the demands of a judge's conscience and the demands of the

⁵ See Avery Cardinal Dulles, S.J., *Catholic Social Teaching and American Legal Practice*, 30 *FORDHAM URB. L.J.* 277, 288 (2002) ("If the existing law is truly contrary to the conscientious convictions of the judge, the judge may have to recuse herself rather than cooperate in a morally evil action.").

law that might force the judge to withdraw from a case. Moral theologians call this analytical framework the principle of cooperation with evil. The third part of my talk will then apply that principle to four cases involving abortion and the death penalty that arguably present a conflict between a judge's conscience and the law.

I.

To begin, we need to focus a bit on the wider context that made the exchange between Senator Durbin and John Roberts such a lightening rod for controversy. The first relevant element of that context is the Doctrinal Note on the Participation of Catholics in Political Life that was issued by the Congregation on the Doctrine of the Faith in November of 2002.⁶ The Doctrinal Note reminded Catholics involved in public life that "a well-formed Christian conscience does not permit one to vote for a political program or an individual law which contradicts the fundamental contents of faith and morals."⁷ In particular, the Note states that "those who are directly involved in lawmaking bodies have a 'grave and clear obligation to oppose any law that attacks human life. For them, as for every Catholic, it is impossible to promote such laws or to vote for them."⁸ As the Note explains, "[w]hen political activity comes up against moral principles that do not admit of exception, compromise or

⁶ Congregation for the Doctrine of the Faith, Doctrinal Note on some questions regarding the Participation of Catholics in Political Life, (November 24, 2002) http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_political_en.html.

⁷ *Id.* at #4.

⁸ *Id.*

derogation, the Catholic commitment becomes more evident and laden with responsibility.”⁹ Finally, the Note asserts that Catholic participation in political life raises “the lay Catholic’s duty to be morally coherent.” This duty is “found within in one’s conscience, which is one and indivisible.”¹⁰ None of us, including public officials, leads parallel moral lives that can be compartmentalized into separate spheres, one spiritual and one secular. Instead, “[l]iving and acting in conformity with one’s own conscience on questions of politics is . . . the way in which Christians offer their concrete contributions so that, through political life, society will become more just and more consistent with the dignity of the human person.”¹¹

These principles drawn from the CDF’s Doctrinal Note laid the foundation for the communion controversy that was provoked by a small number of bishops during the year before the 2004 presidential election. That controversy forms a crucial element of the context behind last summer’s discussion of Roberts’ faith. The bishops who provoked the communion controversy made public statements asserting that Catholic politicians who espouse pro-choice political positions should be excluded from receiving Communion. As Marquette moral theologian, Fr. Bryan Massingale, noted in a speech here at Marquette last October, “the actions taken by these bishops were interpreted as just a shade less serious than public excommunication.”

⁹ *Id.*

¹⁰ *Id.* at #6.

¹¹ *Id.* See also Gregory A. Kalscheur, S.J., *American Catholics and the State*, 191 AMERICA (August 2, 2004), pp. 15-18.

Moreover, the bishops “were widely viewed as implying that it would be immoral for a Catholic to support or vote for a pro-choice candidate.”¹² While the American bishops as a whole ultimately did not adopt such an extreme position, the communion controversy received widespread media coverage and generated significant anger and dismay among Catholic public officials, especially Catholic Democrats with public positions supporting abortion rights.

The debate over John Roberts’ Catholicism in the summer of 2005 erupted in the midst of this lingering anger among some Catholic public officials that was provoked by the 2004 Communion controversy.¹³ In the wake of the exchange between Roberts and Durbin, commentators began openly to ask the following question: would the bishops treat the Catholic John Roberts in the same way in which they had treated the Catholic John Kerry? Former New York Governor Mario Cuomo, for example, wondered “how those bishops who tormented [John] Kerry would react if [Judge] Roberts said that his religious views would *not* affect his rulings on abortion cases.”¹⁴

Cuomo noted that most of the Catholic public officials targeted by “conservative clerics and politicians . . . for refusing to use their office to ‘correct’ the law of the land” on abortion have been Democrats. “But,” Cuomo argued, “now that Judge [John Roberts] – [the conservatives’] candidate – has been

¹² Bryan Massingale, *Catholic Participation in Political Life*, 35 ORIGINS 469, 471 (Dec. 22, 2005).

¹³ Richard Garnett, *Kmiec, Cuomo, and Russert*, posted at http://www.mirrorofjustice.com/mirrorofjustice/2005/08/kmiec_cuomo_and.html (August 7, 2005) (describing the “lingering anger” of many Catholics over the communion controversy as the “back story” to the debate about Roberts’s Catholicism).

¹⁴ E.J. Dionne, Jr., *Why It’s Right to Ask About Roberts’s Faith*, WASH. POST, August 2, 2005, at A13 (quoting a phone conversation with Cuomo).

nominated for the U.S. Supreme Court, the shoe is on the other political foot. Conservatives are outraged that another Catholic public official might be considered deserving of the same criticism” that had been leveled against Catholic Democrats.¹⁵ An op-ed piece by Michael McGough in the Los Angeles Times similarly asserted that, “for those bishops who *do* take a hard line against pro-choice legislators, there is no excuse in theology or logic for holding back from sanctioning Catholic judges – such as Supreme Court Justice Anthony M. Kennedy – who vote to affirm or apply *Roe vs. Wade*.”¹⁶ Amy Sullivan on the blog Beliefnet made the same argument, asserting that “an honest look at the Church’s statements on the special responsibilities of Catholic public officials to uphold Church teaching on abortion must conclude that they do not exempt officials in judicial positions.”¹⁷

During the Senate confirmation hearings held in September 2005 and January 2006, Democratic Senators pressed both John Roberts and Samuel Alito to speak about the relationship between their faith and their judicial role. Senator Feinstein from California led off her questioning by asking John Roberts whether he agreed with John F. Kennedy’s affirmation of “belie[f] in an America where the separation of church and state is absolute.”¹⁸ Roberts responded by saying, “I don’t know what [you] mean[] when you say absolute separation. I

¹⁵ Mario M. Cuomo, *Put a Little Faith in Roberts; Go Ahead, Ask Him About His Religious Beliefs. As Long As He Puts the Constitution First, There Should Be No Problem*, L.A. TIMES, August 25, 2005, at B13.

¹⁶ Michael McGough, *Catholic Judges and a Higher Authority*, L.A. TIMES, August 1, 2005, at B11.

¹⁷ Amy Sullivan, *The Catholic Choice*, http://www.beliefnet.com/story/178/story_17836.html.

¹⁸ Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be the Chief Justice of the United States Before the S. Comm. On the Judiciary (Sept. 13, 2005), available at 2005 WL 2214702 (F.D.C.H.).

do know this: that my 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."¹⁹

Five months later, during the Alito confirmation hearings, Senator Durbin asked Judge Alito what role his personal, religious, or moral beliefs would play in his judicial decision making process. Alito's answer echoed the answer given by John Roberts at his own confirmation hearings: "My obligation as a judge is to interpret and apply the Constitution and the laws of the United States and not my personal religious beliefs or any special moral belief that I have. And there is nothing about my religious beliefs that interferes with my doing that. I have a particular role to play as a judge. That does not involve imposing any religious views that I have or moral views that I have on the rest of the country." Senator Durbin was quick to praise this answer, noting that Alito's response acknowledged that Alito was describing "the same challenge many of us face on this side of the table with decisions we face."²⁰

Senator Durbin's reaction to Judge Alito's answer is worth pausing over. Catholic public officials like Senator Durbin, Senator Kerry, and Governor Cuomo have often responded to ecclesial criticism of their voting records by drawing a line between their personal religious and moral views and their public policy positions. While as Catholics they may be personally opposed to abortion,

¹⁹ *Id.*

²⁰ 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.).

they contend that they cannot impose their personal religious views on the rest of the country. The bishops' frustration with this sort of separation of personal conscience from political policy was clearly one of the factors driving the communion controversy that followed the promulgation of the CDF Doctrinal Note. Senator Durbin seemed to suggest that he heard the same sort of disconnect in Judge Alito and Judge Robert's explanation of the relationship between their personal faith and their public role as judges. In fact, Senator Durbin's comment on Alito's answer implicitly seems to suggest the following provocative question: if the bishops are so upset with Senator Kerry and Senator Durbin for separating their personal views as Catholics from their public policy positions, why doesn't consistency demand that the bishops criticize Catholic judges for separating their Catholic beliefs from their public decision making as judges?

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

legislators and judges mean that legislators and judges are usually making very different sorts of decisions.

The role of the legislator is to craft laws that will best promote the common good. Let's assume that a legislator states sincerely that he or she is persuaded that abortion is a grave moral evil because it is an attack on the inviolable dignity of human life. That conscientious conclusion has consequences for how that legislator ought to think about public policy. Such an attack on human life undermines justice and the common good by violating the fundamental right to life. If that policy maker desires to live a life of integrity and moral coherence, his or her participation in politics should not be cut off from the conscientious judgment he or she has made about the morality of abortion. Because the policy maker's role is to craft policy that will best promote the common good, such a policy maker has a duty to promote justice and the common good by striving to reduce the incidence of abortion.

How a policy maker should go about striving to reduce the incidence of abortion in contemporary American culture, under existing constitutional constraints, and in the face of significant social disagreement with regard to the underlying moral issue, is an exceptionally complicated question. Good lawmaking is never simply a matter of directly transposing moral conclusions into rules of civil law. Indeed, the question of how best to promote fundamental moral values through law and public policy so as to most effectively benefit the common good in the concrete situation facing the legislator is, I would argue,

always a contingent question that calls for the legislator to exercise the virtue of prudence.²¹ At the very least, however, a legislator who in good conscience believes that abortion is a moral evil should not vote in favor of public funding for abortion. To support such funding amounts to a violation of one's conscientious judgment about the moral evil of abortion by intentionally facilitating abortions.

While the role of the legislator is to shape policy in order to best promote the common good, the role of the judge is quite different. The role of the judge in our constitutional system is not to make law or shape public policy. Instead, the primary role of the judge is to use the tools of legal analysis to interpret the Constitution and laws and to apply those laws as they exist in the context of deciding individual cases. It is not the role of the judge to reshape the law to conform to his or her personal convictions about what the law ought to be.²²

Some of you may be familiar with the work of one of the great Catholic judges in America today, Judge John Noonan of the U.S. Court of Appeals for the Ninth Circuit. In 1995, Judge Noonan authored an opinion rejecting a constitutional challenge to the state of Washington's prohibition of physician-assisted suicide. One of the plaintiffs challenging the statute was a group called Compassion in Dying. Judge Noonan's opinion closed with these words:

²¹ See Kalscheur, *American Catholics and the State*, *supra* note 11. See also Massingale, *supra* note 12, at 470 (discussing the role of the virtue of prudence; "Prudence . . . seeks not the absolute best, but the best that can be attained for now.");

²² See Dulles, *supra* note 5, at 287-88. See also William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 *YALE L. & POL'Y REV.* 347, 355-58 (2006) (discussing how the role and duty of the judge differs from that of the legislator or executive).

“Compassion cannot be the compass of a federal judge. That compass is the Constitution of the United States.”²³ Similarly, I think we have to acknowledge that Catholic doctrine cannot be the compass for the judge. There is no official church teaching that defines how Catholic judges should interpret the United States Constitution. Such a question is beyond the competence of the Church’s teaching office. Judge Noonan didn’t uphold the Washington statute because it conformed to the church’s teaching that euthanasia is a moral evil; instead, Judge Noonan upheld the statute because nothing in the Constitution prohibited the state from enacting such a statute.

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

²³ *Compassion in Dying v. Washington*, 49 F.3d 586, 594 (9th Cir. 1995)

to decide whether the action required of him by the law in a particular case culpably contributes to the morally objectionable act of another person.

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

II.

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

the law requires. In order to help people navigate these sorts of situations without themselves committing wrongful actions, moral theologians have developed an analytical framework that is called the principle of cooperation.

Before going any further down this road, I want to offer a disclaimer: the principle of cooperation is not a bright-line rule that provides us with many easy answers. In fact, an English Jesuit theologian once wrote in a textbook that of all the principles in moral theology, the principle of cooperation is the most difficult to apply.²⁴ In light of that difficulty, I want to acknowledge upfront that the conclusions drawn from application of the principle of cooperation to particular cases can often be open to dispute. As Fr. Jim Keenan, a moral theologian at Boston College, has explained, the principle of cooperation “is not designed automatically to generate undebatable answers to what are undeniably complex questions.”²⁵ Moreover, I am just a law professor, not a moral theologian, so I’m stepping a bit outside my area of expertise here. But the principle of cooperation is the analytical tool that the Catholic tradition gives us to help us try to sort out which conflicts between conscience and the law ought to lead conscientious judges to refrain from deciding particular cases. With that in mind, all we can do is make our best effort to use the tool the tradition makes available.

²⁴ See Thomas R. Kopfensteiner, *The Man With a Ladder*, 191 AMERICA (Nov. 1, 2004), at 9 (referring to Henry Davis, S.J., author of *Moral and Pastoral Theology* (1958)).

²⁵ M. Cathleen Kaveny, *Appropriation of Evil: Cooperation’s Mirror Image*, 61 THEOLOGICAL STUDIES 280, 284 (2000) (referring to Keenan).

The general definition of cooperation with evil is “concurrence with another person in [an] act” that is morally wrong.²⁶ Professor Cathy Kaveny, who teaches law and moral theology at Notre Dame, notes that the principle of cooperation addresses the following sorts of questions: “How do we decide when the contribution that our action will make to another’ wrongdoing is too great, or the connection between their action and ours is too close? When does making such a contribution morally stain us, and when it is it simply the regrettable, inevitable consequence of living in a fallen world that is also ineluctably social?”²⁷ The Australian Dominican, Bishop Anthony Fisher, articulates the questions addressed by the principle of cooperation in this way: “How close to taking part in the act itself can one person get to the wrongful act of another, without becoming a culpable accessory? How involved can one be in the wrongful act of another without being tainted by it?”²⁸

The analytical framework that has developed around the principle of cooperation begins to answer these questions by making a crucial distinction between formal cooperation and material cooperation.²⁹ Pope John Paul II, in the encyclical *Evangelium Vitae*, stated that everyone is “under a grave obligation of conscience not to cooperate formally” in evil actions. Formal cooperation is defined as cooperating in [a morally wrongful act] while “sharing in the immoral

²⁶ *Id.* at 282 (quoting textbook by Henry Davis, S.J.).

²⁷ *Id.* at 283.

²⁸ *Id.* (quoting Anthony Fisher, *Cooperation in Evil*, 44 CATHOLIC MEDICAL QUARTERLY 15 (1994)).

²⁹ *Id.* at 284.

intention of the person committing [the act].” Put simply, formal cooperation in evil is always wrong.³⁰

Material cooperation, in contrast, can sometimes be justified for a proportionate reason. A person engages in material cooperation when he or she does something that facilitates or creates the conditions for a wrongful act, but the person does not share in the intention of the actor who actually engages in the wrongful conduct. The permissibility of material cooperation has to be assessed on a case-by-case basis, and moral theologians have developed elaborate sets of categories that attempt to capture the various factors that help to determine whether a person has a proportionate reason to engage in an act of material cooperation.³¹

A first set of categories distinguishes between mediate and immediate material cooperation. Cooperation is “immediate” where the cooperating person participates directly in the wrongful act in some way. In contrast, the cooperation is “mediate” when the person merely has a role in creating the conditions that allow the act to occur. For example, a technician who keeps the heat and electricity operating at a hospital that performs abortions is involved in mediate cooperation, but a doctor who assists another physician in abortions (even though she disapproves of them) is involved in immediate cooperation.

³⁰ Kopfensteiner, *supra* note 24, at 10 (quoting John Paul II, *Evangelium Vitae* #74 (discussing the general principles concerning cooperation in evil actions)).

³¹ The summary of the analytical framework that follows is drawn from Professor Kaveny’s 2000 article in *Theological Studies*. See Kaveny, *supra* note 25, at 284-86. See also M. Cathleen Kaveny, *Prophecy and Casuistry: Abortion, Torture and Moral Discourse*, 51 VILL. L. REV. 499, 526-530 (2006) (describing the “extremely nuanced distinctions” that characterize the analytical matrix governing the issue of cooperation with evil).

An outside observer, who knew nothing of the assisting doctor's intention, wouldn't be able to tell the difference between the doctor's act of participating in the abortion and the wrongful act of abortion itself. Acts of immediate material cooperation are almost always wrong; they can only be justified when performed under extreme duress.

A second set of categories in the tradition makes a distinction between remote and proximate material cooperation. As an act of material cooperation gets closer to the wrongful act in time, space, or causal connection, the harder it is to justify. In contrast, there may be some proportionate reason that justifies an act of remote material cooperation. Whether or not a proportionate reason justifying the act exists may in turn depend on additional factors. For example, how grave a loss would be suffered by the cooperator if she declines to engage in the act of cooperation? What is the magnitude of the evil that will result from the wrongful act intended by the other person? And, finally, how much risk is there that the act of cooperation will cause scandal to others? Professor Kaveny notes that "causing scandal" in this context has to be understood in its specialized theological sense: does performing a particular action increase the possibility that people who witness the action will engage in morally objectionable activity themselves? Will the act of cooperation have the effect of leading other people into sin?³²

³² See Kaveny, *supra* note 25, at 285-86 & n. 14.

This framework for analysis was refined over time through the process of comparing and contrasting particular cases that is known as casuistry. Among the classic cases discussed by the casuists was a situation particularly relevant to our discussion this evening: can a Catholic judge preside over a divorce case? The traditional answer is yes; for grave and proportionate reasons, such judges may act in accordance with the traditional principles of material cooperation.³³ The casuists argued that it is generally good for a conscientious judge to be part of the legal system, because of the justice that we hope the work of the judge can bring to the institution of the law as a whole.³⁴ The judge, therefore, has a proportionate reason for being faithful to the demands of the law in this case.

Fr. Thomas Kopfensteiner, a professor of moral theology at Fordham, has developed a concrete illustration that might make the principle of cooperation a bit easier to understand. He describes the principle of cooperation as the “ladder holding” principle.³⁵ To understand what he means by that, imagine three different men. The first man makes ladders; the second man sells those ladders in his hardware store; the third man bought a ladder in that hardware store and now is holding the ladder for a friend who is a burglar breaking into a house.

Each of these three men acts in a way that has connection to the wrongful act of burglary, but the first two men are engaged in legitimate acts of material

³³ See John Paul II, *Marriage Indissolubility and the Roles of Judges and Lawyers (Address to the Roman Rota)*, 31 ORIGINS 597, 601 (“For grave and proportionate motives [judges] may act in accord with the traditional principles of material cooperation.”).

³⁴ See James F. Keenan, S.J., *Cooperation, Principle of*, in THE NEW DICTIONARY OF CATHOLIC SOCIAL THOUGHT (Judith A. Dwyer, ed. 1994), at 234.

³⁵ See Kopfensteiner, *supra* note 24, at 10.

cooperation. The first two men are connected to the wrongful act only because their material assistance has been misused by the burglar. The man who made the ladder is involved in remote material cooperation, while the owner of the hardware store is involved in more proximate material cooperation. But it's not reasonable to conclude that these men's moral characters are stained by the burglar's misuse of the ladder that is the fruit of their pursuit of legitimate livelihoods.

The man who held the ladder for his friend the burglar, however, is in a different position. If he shares the criminal intent of his friend, then he is engaged in an illicit act of formal cooperation. But even if the man tried to dissuade his friend from engaging in this act of burglary, holding the ladder while his friend used it to break into the house constitutes immediate participation in the wrongful act. Unless he did so under some sort of duress, his act is probably best characterized as illicit immediate material cooperation.

III.

Now we are in a position to apply the principle of cooperation to the issues of abortion and the death penalty that might confront Catholic judges working in the contemporary American legal system. What sorts of issues might create a conflict between the judge's oath to faithfully and impartially apply the Constitution and laws of the United States and that same judge's moral obligation to be faithful to the demands of his or her religiously informed

conscience? I'll explore that question by briefly considering the following four cases:

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

2. Does a judge culpably cooperate with evil by holding that the federal statute prohibiting partial-birth abortion is unconstitutional? This was the situation faced by federal district judge Richard Conway Casey when he presided over the trial of the case challenging the constitutionality of the federal partial-birth abortion ban two years ago. The U.S. Supreme Court, with its new Catholic majority, will hear oral argument on the constitutionality of that federal statute on November 8 of this year.

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

4. Does a judge who wants to be faithful to the Church's teaching about the death penalty culpably cooperate with evil by participating in the judicial proceedings associated with capital punishment? Justice Harry Blackmun

declared toward the end of his time on the Supreme Court that he could no longer “tinker with the machinery of death.”³⁶ Must a Catholic judge take the same stance? Can a Catholic judge cooperate with the “machinery of death”?

Case #1

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁷ the Court opened up some new space for abortion regulation, while reaffirming the core holding of *Roe v. Wade*. The constitutional law with respect abortion after *Casey* has three central components: 1) prior to viability, women have a constitutionally protected liberty interest to make the decision to have an abortion. 2) Pre-viability regulation of abortion is unconstitutional if it places an undue burden on the woman’s right to choose to have an abortion. 3) After viability, the state is free to prohibit abortion, except where appropriate medical judgment deems the abortion to be necessary to preserve the life or health of the mother.

Four members of the Court – Justices White, Scalia and Thomas, along with Chief Justice Rehnquist – were prepared in *Casey* to overrule *Roe*. Two other members of the Court, Justices Blackmun and Stevens, wanted to retain the broad protection of the freedom to make the abortion decision that was drawn from *Roe*. The outcome of the case was, therefore, determined by the remaining

³⁶ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (“From this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.”)

³⁷ 505 U.S. 833 (1992).

three justices – O’Connor, Kennedy, and Souter – whose joint opinion now provides the controlling constitutional doctrine on abortion.

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

The joint opinion then makes this interesting statement: even though Pennsylvania made weighty arguments that *Roe* should be overruled, “the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.”³⁸ In plain English, Justices O’Connor, Souter, and Kennedy are saying that, even if we think *Roe* was wrongly decided, it is a precedent that people have come to rely on in planning their lives, and if we overrule that precedent now we will do damage to both the rule of law and to the legitimacy of the Court as an institution.

I think that the arguments made by the joint opinion are wrong as a matter of good constitutional analysis. At the same time, however, I do not think

³⁸ 505 U.S. at 853.

that we should conclude that a judge whose informed conscience tells him that abortion is a moral evil culpably cooperates in evil by taking the sort of position articulated by the joint opinion. A judge could reasonably join the joint opinion because he sincerely concludes that the Constitution, when properly interpreted, does provide protection for the right to make the abortion decision.

Alternatively, a judge could join the joint opinion because he sincerely concludes that respect for the rule of law prevents him from voting to overrule the precedent established in *Roe*.

To conclude as a matter of constitutional law that a woman's right to make the abortion decision must be protected *does* facilitate abortion by creating the conditions that allow abortions to take place. If *Roe* were overruled, states would be free to prohibit more abortions, and some states would choose to do so. The judicial act of voting to maintain the central holding of *Roe* does, therefore, raise the issue of cooperation with evil. But the judge reaching such a conclusion for the reasons that I've described does not share in the intent of a woman who chooses to have an abortion. Accordingly, voting to uphold *Roe* does not constitute illicit formal cooperation. Moreover, voting to uphold *Roe* doesn't require anyone to engage in any immoral act; it does no more than say that the law can't prohibit a particular sort of immoral act. As Justice Scalia has said, "a judge . . . bears no moral guilt for the laws society has failed to enact."³⁹

³⁹ Justice Antonin Scalia, Remarks at Pew Forum Panel Discussion: A Call for Reckoning: Religion and the Death Penalty (Jan. 25, 2002), transcript available at <http://pewforum.org/deathpenalty/resources/transcript3.php3>.

Refusing to overrule *Roe* seems to be most accurately characterized as nonculpable remote, mediate, material cooperation, which can be justified by the judge's duty to be faithful to his oath to uphold the law as he understands it.

Professor Douglas Kmiec explains that the Church does not instruct judges to make the law better if doing so would require them to act outside the proper bounds of their role as a judge. Thus, Catholic justices do not have a specific Catholic duty to use their power on the bench to restrain abortion.⁴⁰ The judge's duty is to use the tools of constitutional interpretation to ascertain how the Constitution deals with the question of abortion. Professor Kmiec concludes that, "in ruling on . . . matters [of constitutional law], a judge does not become morally complicit in the underlying act [that the law might allow] or share i[n the] intent" of the actor engaged in constitutionally permitted, but wrongful, conduct.⁴¹

Case #2

The case of a judge faced with a constitutional challenge to the federal partial-birth abortion statute should be analyzed in much the same way we just analyzed Case #1. A judge whose ruling strikes down a law that would restrict some abortions because that judge reaches the legal conclusion that the law is unconstitutional is not morally complicit in the abortions that would have been prohibited by the unconstitutional law. Judge Casey of the U.S. District Court

⁴⁰ Douglas W. Kmiec, *The Catholic Judge and Roe v. Wade* (Nov. 3, 2005), available at http://www.beliefnet.com/story/178/story_17832_1.html.

⁴¹ Douglas W. Kmiec, *Catholic Judges, the U.S. Constitution and Natural Law* (Interview with Catholic Online, Aug. 30, 2005).

for the Southern District of New York faced this situation in the case of *National Abortion Federation v. Ashcroft*.⁴²

The plaintiffs in that case challenged a statute passed by Congress in 2003 that bans the procedure the Act calls partial-birth abortion, unless the procedure is necessary to save the life of the mother. Congress passed this law after the Supreme Court in 2000 struck down a similar Nebraska law in the case of *Stenberg v. Carhart*.⁴³ The *Stenberg* Court held that the Nebraska law was unconstitutional because it did not provide an exception allowing the procedure when it was necessary, in appropriate medical judgment, to preserve the health of the mother. As a lower court judge, Judge Casey was bound to apply the Supreme Court's decision in *Stenberg* as the relevant precedent governing his analysis of the constitutionality of the new federal statute.

Judge Casey ultimately concluded that there was no way to read *Stenberg* that would allow him to conclude that the federal statute was constitutional. He closed his opinion enjoining enforcement of the statute with these words: "While . . . lower courts may disagree with the Supreme Court's constitutional decisions, that does not free them from their constitutional duty to obey the Supreme Court's rulings. . . . The Supreme Court in *Stenberg* informed us that this gruesome procedure may be outlawed only if there exists a medical consensus that there is no circumstance in which any woman could potentially benefit from

⁴² 330 F. Supp.2d 436 (S.D.N.Y. 2004), *aff'd sub nom.* National Abortion Fed. v. Gonzales, 437 F.3d 437 (2d Cir. 2006).

⁴³ 530 U.S. 914 (2000).

it. A division of medical opinion exists, [and] such a division means that the Constitution requires a health exception. *Stenberg* obligates this Court . . . to defer to the expressed medical opinion of a significant body of medical authority. . . . *Stenberg* remains the law of the land. Therefore, the Act is unconstitutional.”⁴⁴

I don't think this ruling makes Judge Casey morally culpable for the law's inability to prohibit a practice which Judge Casey's opinion describes in excruciating detail, and which the Judge's factual findings explicitly characterize as “a gruesome, brutal, barbaric, and uncivilized medical procedure.” As in Case #1, I think that Judge Conway's action is best characterized as remote, mediate, material cooperation that is justified by the proportionate reason of the judge's duty to be faithful to his oath to uphold the law, which here includes an obligation to obey a controlling Supreme Court precedent. The Supreme Court itself will get the chance to revisit that precedent this fall.

Case #3

The moral situation facing a judge called upon to preside over a judicial bypass proceeding where a minor is seeking authorization for an abortion without her parents' involvement is, I think, more precarious. Forty-four states, including Wisconsin, have statutes requiring that a parent be involved in their minor daughter's decision to seek an abortion.⁴⁵ Some states require parental consent, others require parental notification. In order for a parental consent

⁴⁴ 330 F. Supp.2d at 492-93.

⁴⁵ See *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961, 966 n.1 (2006).

statute to withstand constitutional scrutiny, the statute must allow a minor who does not wish to involve her parents in the decision to petition a judge to authorize the abortion without parental consent.⁴⁶ The Wisconsin parental consent statute, for example, provides that, except in cases involving a medical emergency or other specified extenuating circumstances, a physician may not perform an abortion for a minor *unless* 1) the physician has received the informed written consent of one of the minor's parents *or* 2) a court has granted a petition waiving the parental consent requirement.⁴⁷ The statute further provides that the court "shall grant the petition" if the court after a confidential hearing finds either "that the minor is mature and well-informed enough to make the abortion decision on her own," or "that the performance . . . of the abortion is in the minor's best interest."⁴⁸

A judge who believes that abortion is a moral evil and is called upon to preside over one of these parental consent bypass hearings may indeed face a conflict between conscience and an act that he is required by the law to perform. Unlike the judges called upon to interpret the Constitution in Cases #1 and #2, the judge in Case #3 may be required by the law to issue an order authorizing a particular girl to obtain an abortion without her parents' consent. Would the judge be morally complicit in the girl's abortion if he issued such an order?

⁴⁶ See *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997).

⁴⁷ WIS. STAT. ANN. § 48.375(4).

⁴⁸ WIS. STAT. ANN. § 48.375(7)(c).

I think the material cooperation here is proximate, not remote; the judge's action here is closer to an actual act of wrongdoing than is true in either Case #1 or Case #2. At the same time, I don't think the judge here is in exactly the same position as the man holding the ladder for his friend the burglar in Fr. Kopfensteiner's example. It's still possible to separate the judge's act of applying the law from the girl's independent act of deciding whether to have the abortion or not. If the girl decides to have the abortion, she would be misusing the freedom that the judge's obligation to comply with the law gives her. Still, in light of the temporal proximity that the order authorizing the abortion would have to the actual act of wrongdoing, the gravity of the wrongdoing that is being explicitly authorized by the judge, and the critical role played by the judge in making it possible for the girl to obtain the abortion, it may be difficult to conclude that the judge's act of material cooperation can be justified by a proportionate reason. Perhaps the judge's moral integrity would demand recusal in this case.

Judges have in fact begun to opt out of these abortion petition cases on moral grounds. Last September the New York Times reported that a Tennessee judge refused to hear a minor's abortion petition case.⁴⁹ The judge also announced that he would recuse himself from all such cases in the future. Judge John R. McCarroll of the Shelby County Circuit Court explained that he recused

⁴⁹ Adam Liptak, *On Moral Grounds, Some Judges Are Opting Out of Abortion Cases*, N.Y. TIMES, Sept. 4, 2005, § 1, at 21.

himself, because he believed that “[t]aking the life of an innocent human being is contrary to the moral order,” and he therefore “could not in good conscience make a finding that would allow the minor to proceed with the abortion.”⁵⁰ In effect, Judge McCarroll was saying that his conscience made it impossible for him to follow the law that applied to the case. Four of the other nine judges on the Shelby County court have made similar recusal decisions, and the Times reports that judges in Alabama and Pennsylvania have also said they will not hear such cases.

In response to Judge McCarroll’s announcement, twelve experts on judicial ethics wrote to the Tennessee Supreme Court describing his action as “lawless.” The letter explained that “unwillingness to follow the law is not a legitimate ground for recusal.” The law professors’ letter asserted that Judge McCarroll’s only options were to enforce the law or resign from the bench. One of the professors, Susan Koniak, said that “judges are free to express their moral disagreement with a law but [are] not free to decline to enforce [a law with which they disagree]. And one of Judge McCarroll’s colleagues in Shelby County had this to say, “I didn’t swear to uphold all of the laws of Tennessee except for X, Y, and Z. [A judge] is sworn to uphold the law whether you agree with it or not.”⁵¹

⁵⁰ *Id.*

⁵¹ *Id.* The experts were contacted by Judge McCarroll’s colleague, Judge D’Army Bailey. See D’Army Bailey, *The Religious Commitments of Judicial Nominees – Address by Judge Bailey*, 20 N.D. J. OF LAW, ETHICS & PUB. POL’Y 443, 444 (2006) (“If a judge could not enforce the law, then, as people have often had to do when they face matters of conscience, the judge should pay the price of his or her conscience. The price of a judge’s conscience would be to step down from the bench. . . . I disagree with the proposition that a judge should have a blanket recusal in cases of this sort.”).

Judge McCarroll, however, argued that his recusal from these cases was both appropriate and required. He noted that “[a] judge should recuse himself or herself if there is any doubt about the judge’s ability to preside impartially or if the judge’s impartiality can reasonably be questioned.”⁵² This strikes me as a reasonable argument: if the judge could not in good conscience issue an order to which the girl seeking an abortion may be legally entitled, he can’t reach an impartial decision in the case and should recuse himself.

Case #4

Does a judge who wants to be faithful to the church’s teaching on the death penalty culpably cooperate with evil by participating in the judicial proceedings associated with capital punishment? As the three abortion cases we’ve just considered suggest, this is a complex question because of the variety of roles that judges can play in the legal proceedings surrounding capital punishment. The cooperation analysis will depend on just what sort of role the judge is playing. Before briefly touching on that complexity, I want to spend a moment describing the Church’s teaching on capital punishment.

The Church does not teach that the death penalty is an intrinsic evil. This makes imposition of the death penalty different from the intentional taking of innocent life involved in abortion. The current Catechism of the Catholic

⁵² Liptak, *supra* note 49. See also Pryor, *supra* note 22, at 361 (arguing that recusal allows the judge both to honor the law “by refusing to disobey it” and honor his conscience “by avoiding cooperation with evil”; “The judge cannot be impartial to his moral duty, and [the canons of judicial ethics] require[] a judge to ‘disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.’ The law acknowledges that judges, in rare cases, should step aside.”).

Church, however, does insist that the death penalty can only be used when it is the only possible way of effectively defending human lives against an unjust aggressor. When non-lethal means are available to protect people's safety, the state should limit itself to using those non-lethal means, because they are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person. Under contemporary conditions in a developed country like the United States, society can be adequately protected by keeping criminals securely incarcerated.⁵³ In light of this teaching, it is difficult to imagine when the imposition of the death penalty could be characterized as a just punishment in the United States.

Thirty-eight states and the federal government, however, do authorize use of the death penalty in some cases. Can a judge who accepts the Church's teaching on the death penalty participate in judicial proceedings that will culminate in the imposition of an unjust penalty? Can a Catholic judge cooperate with the "machinery of death"? Justice Scalia, who rejects the Church's teaching on the death penalty, argues that Catholic judges who share the Church's understanding of the death penalty should resign their office if they are unable to uphold the laws they are sworn to enforce.⁵⁴

⁵³ CATECHISM OF THE CATHOLIC CHURCH #2267 (citing John Paul II, *Evangelium Vitae*, #56).

⁵⁴ See Scalia, *supra* note 39 ("[I]n my view, the choice for the judge who believes the death penalty to be immoral is resignation rather than simply ignoring duly enacted constitutional laws and sabotaging the death penalty. He has after all, taken an oath to apply those laws, and has been given no power to supplant them with rules of his own.").

I think a more careful analysis of the problem, however, is provided by John Garvey and Amy Coney in a 1998 Marquette Law Review article entitled, “Catholic Judges in Capital Cases.”⁵⁵ They argue that Catholic judges who accept the teaching of the Church are morally precluded from enforcing the death penalty. Determining whether this judgment of conscience will require the judge to recuse herself from participating in a capital case will depend on the particular role that judge plays in the proceedings. For example, a judge who accepts the Church’s teaching should withdraw from any role that will require her to impose a sentence on a defendant in a death penalty case. Garvey and Coney argue that a judge who imposes a death sentence is engaged in formal cooperation with an unjust act. The judge who issues a sentencing order imposing the death penalty sets in motion a process in which the government is bound to execute the defendant unless there is an executive pardon. The judge who issues the sentencing order intends that this execution should take place. Accordingly, the judge here plays a role in an unjust act that amounts to formal cooperation, which is always prohibited.

In contrast, Garvey and Coney argue that a judge could preside over the trial on the issue of guilt or innocence in a death penalty case, so long as the judge does not participate in the sentencing phase of the proceedings. The judge here would be engaged only in material cooperation in the death sentence that

⁵⁵ John H. Garvey and Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQUETTE LAW REV. 303 (1998).

might or might not be imposed on a defendant found guilty at trial. Would the judge have a proportionate reason that justifies such material cooperation?

Garvey and Coney argue that the judge would have a strong reason to preside over the trial on the issue of guilt. Society needs judges to enforce the criminal law. Such judges help maintain a peaceful and just society. It is this social good that should be weighed against the harm of material cooperation. The evil of capital punishment is grave – it amounts to the unjust taking of human life. But the judge here does not actually participate in the sentencing, and does not know for certain that the death penalty will actually be imposed when the sentencing phase of the case takes place. Recusal would not prevent the evil, because the judge would simply be replaced by another judge. For these reasons, Garvey and Coney conclude that the material cooperation in capital punishment provided by the judge's participation in the guilt phase of the case is morally justified.

The most difficult question of cooperation to analyze might be faced by a judge reviewing a death sentence on direct appeal. Such a judge would be engaged in an act of material cooperation; affirming the sentence simply means that the trial court has followed the law in imposing the death penalty. The appellate judge, therefore, shouldn't be characterized as intentionally directing or promoting the defendant's execution in a way that amounts to illicit formal cooperation in the execution. But is the material cooperation involved in affirming the death sentence justified by a proportionate reason?

Garvey and Coney are unsure whether the judge should reach that conclusion. Their uncertainty is rooted in their sense that most people would probably understand the act of affirming the death sentence as endorsement of death sentence. This raises the issue of scandal. Moral theologian Germain Grisez explains that “[s]ometimes the fact that ‘good’ people are involved [in a process that leads to wrongdoing] makes wrongdoing seem not so wrong and provides material for rationalization and self-deception by people tempted to undertake the same sort of wrong. . . . [O]ften the material cooperation of ‘good’ people in wrongdoing leads others to cooperate in it formally.”⁵⁶ These considerations lead Garvey and Coney to conclude that it’s exceedingly difficult to pass general judgment on the morality of participating in the appellate review of capital sentencing. The proper conclusion may vary from case to case.

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

⁵⁶ *Id.* at 329 (quoting GERMAIN GRISEZ, 3 THE WAY OF THE LORD JESUS: DIFFICULT MORAL QUESTIONS, App. 2, at 881 (1997)).

political actors have made decisions that are authorized by the Constitution. A Supreme Court justice might well conclude that the Eighth Amendment does not prevent Congress or a state legislature from enacting the death penalty. I don't believe it's reasonable to characterize that legal conclusion as a moral endorsement of the legislature's independent choice to in fact authorize use of the death penalty. The judicial act of choosing not to undo the constitutionally authorized decision of another political actor is, therefore, a form of remote material cooperation that can be justified by the judge's duty to faithfully interpret the Constitution and respect the division of authority established by the Constitution.⁵⁷

Conclusion

The conclusions that I've proposed for each of the cases I described are certainly open to reasonable debate. One thing, however, should be clear: careful attention to the role being played by the judge in a given case is essential to an adequate analysis of the cooperation issue. Contrary to Prof. Turley's suggestion, I believe that it's highly unlikely that a Supreme Court justice like John Roberts will find himself in the sort of conflict between conscience and the Constitution that might require him to withdraw from participating in an abortion or death penalty case. It may in fact be trial judges who find themselves in more complicated situations of cooperation with respect to these issues.

⁵⁷ *Id.* at 330-31.

I want to close my remarks this evening by suggesting that our commitment to wrestle with the question of cooperation is at least as important as the particular conclusions that any one of us might reach in analyzing a particular case. Much of the debate about the role of Catholics in public life has failed to address that complex issue with the nuance and attention to careful distinctions that the long tradition of Catholic reflection on the principle of cooperation offers to us. That is true whether the debate about the role of Catholics in public life focuses on judges, politicians, or voters. We should, therefore, attend to the question of cooperation with conscientious care, because the principle of cooperation is not simply a matter of abstract theological speculation. At the heart of the analysis that has developed around the principle of cooperation is the question of what sort of people we will become through our actions in the world.⁵⁸

We could avoid that question by fleeing from participation in public life in an effort to insulate ourselves from any risk of ever cooperating in another person's wrongful action.⁵⁹ But the gospel calls us to cooperate with God's love at work in the world through the ways in which we live our daily lives as judges and lawyers and doctors and teachers and citizens. As we try to cooperate with God's Spirit at work in a human community that is also marked by ambiguity

⁵⁸ See M. Cathleen Kaveney, *Tax Lawyers, Prophets and Pilgrims: A Response to Anthony Fisher*, in *COOPERATION, COMPLICITY & CONSCIENCE: PROBLEMS IN HEALTHCARE, SCIENCE, LAW AND PUBLIC POLICY* (Helen Watt, ed., 2005), at 66

⁵⁹ See *id.* at 69.

and sin,⁶⁰ we need to pay attention to this question: Who are we becoming as people through the actions that form us as we strive to serve our communities in our varied public roles? I hope my remarks tonight have offered some tools to help us all attend more faithfully to that central question of conscience.

⁶⁰ *See id.* at 74-75.