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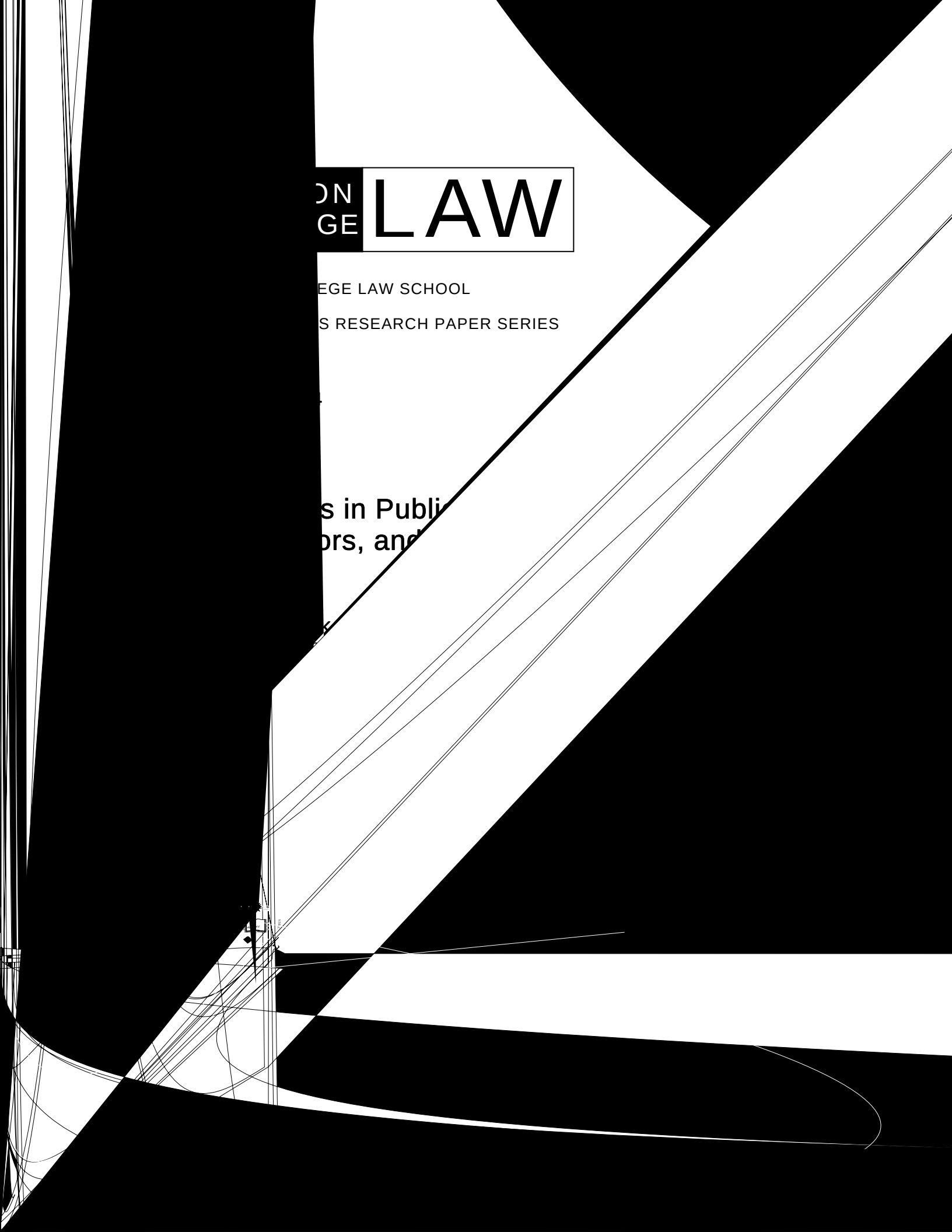

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Catholics in Public Life: Judges, Legislators, and Voters

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

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

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

The media focused attention on the question of the role of the Catholic

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." [3]

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."[4] Turley gave Roberts credit for not saying that his faith would control his legal judgment in the sort of case Durbin proposed, but he did express the fear that, "if [Roberts'] were to recuse himself on such issues as abortion and the death penalty, it would raise the specter of an evenly split Supreme Court on some of the nation's most important cases."[5] While Senator

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

[4] *Id*. The proper role that religious values should play in judicial decision making (i.e., the proper role that religious values should play in the process by which a judge comes to decide what the law actually means and demands in a given case) is a question beyond the scope of this Essay. Indeed, it is a question that is significantly different than the question that Durbin actually asked Roberts. Durbin's exchange with Roberts is really concerned with the following question: what should a morally conscientious judge do when the law as the judge interprets it is truly unjust and the action that the law requires of the judge in a given case is truly in conflict with the conscientious convictions of the judge? Many scholars have considered the distinct question of the role that religious values should play in judicial decision making. *See, e.g.*, Teresa S. Collett, *"The King's Good Servant, but God's First": The Role of Religion in Judicial Decisionmaking*, 41 S. TEX. L. REV. 1277 (2000); Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 MARQ. L. REV. 537 (1998); MICHAEL J. PERRY, RELIGION IN P

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

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

But contrary to the position taken by Professor Turley, I think John Roberts gave the right answer to Senator Durbin's question. Judges whose judicial role requires them to perform an action in a particular case that their religiously informed conscience tells them is immoral might indeed have to recuse themselves. [7]

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.

whether there is a conflict between the demands of a judge's conscience[9] and the

Congregation on the Doctrine of the Faith in November of 2002.[10] The Doctrinal Note reminds Catholics involved in public life that "a well-formed Christian conscience does not permit one to vote for a political program or an individual law which contradicts the fundamental contents of faith and morals."[11] 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."[12] As the Note explains, "[w]hen political activity comes up against moral principles that do not admit of exception, compromise or derogation, the Catholic commitment becomes more evident and laden with responsibility."[13] Finally, the Note asserts that Catholic participation in political life raises "the lay Catholic's duty to be morally coherent." This duty is "found within one's conscience, which is one and indivisible."[14] None of us, including public officials, leads parallel moral lives that can be compartmentalized into

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[10] Congregation for the Doctrine of the Faith, Doctrinal Note on some questions regarding the Participation of Catholics in Political Life, (November 24, 2002), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html.

[11] *Id*. at #4.

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

[13] Doctrinal Note on Participation of Catholics in Political Life, *supra* note 10 at #4.

[14] *Id*. at #6.

separate spheres, one spiritual and one secu

Colorado Springs, in fact, explicitly made just that assertion.[18] While the American bishops as a whole ultimately did not adopt this position,[19] 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. [20] In the wake of the exchange between Roberts and Durbin, commentators began openly to ask the following question: would the bishops treat the Catholic John Roberts in the same way in which they had treated the Catholic John Kerry? Former New York Governor Mario Cuomo, for example, wondered "how those bishops who tormented [John] Kerry would react if [Judge] Roberts said that his religious views would

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not affect his rulings on abortion cases."[21] Would not consistency demand that Judge Roberts be subjected to the same sort of criticism that had been directed at Senator Kerry?

An op-ed piece by Michael McGough in the Los Angeles Times made a similar assertion: "[F]or those bishops who *do* take a hard line against pro-choice legislators, there is no excuse in theology or logic for holding back from sanctioning Catholic judges – such as Supreme Court Justice Anthony M. Kennedy – who vote to affirm or apply

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."[24]

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."[25]

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

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

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

Senator Durbin is not alone in sometimes seeming to blur the distinctions between the different roles played by judges and legislators. After Justice O'Connor announced her retirement from the Court, Bishop William S. Skylstadt, president of the U.S. Conference

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

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

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

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

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

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

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

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

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

[30] Letter from Robert George to Sanford Levinson, *quoted* in Levinson, *supra* note 20, at 1076 n.85; *see also* Eduardo M. Peñalver, *Restoring the Right Constitution?* 116 YALE

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

the morality of abortion. Because the legislator's role is to craft positive law that will best promote the common good, a le

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

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

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

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

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

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

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

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

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

[40] *See* Vischer, *supra* note 27, at 63 ("[T]he law's indeterminacy may allow a judge's rightly formed conception of justice to have a positive impact on the law's development. 'The judge's sense of right and

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

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

[42] Compassion in Dying v. Washington, 49 F.3d 586, 594 (9th Cir. 1995)

[43] *See* notes 40-41, *supra*, and accompanying text.

[44] Cardinal Levada, formerly archbishop of San Francisco and now the head of the Vatican Congregation on the Doctrine of the Faith, has asserted that the "Supreme Court's judgment about the application of the Constitution should … be guided by the principles of the moral law." Levada, *supra* note 26, at 104. It is not clear what Cardinal Levada means here, but we need not conclude that he is arguing that the Supreme Court has the power to make decisions that comply with the principles of the moral law even when there is no basis in proper constitutional analysis for so concluding. Cardinal Levada notes, for example, that Catholic moral teaching recognizes "that those who make and *interpret* the law are not always able to deal with ideal or perfect solutions." *Id*. (emphasis added). (m)7qy6(h)-53(us th)e7( )4C1.28f0.aa7at C.946 0 Td[(al)6(would seem)11

without themselves committing wrongful actions, moral theologians have developed an analytical framework that is called the principle of cooperation.[47]

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 theolo

intention of the person committing [the act]."[55] Put simply, formal cooperation in evil is always wrong.[56]

capture the various factors that help to determine whether a person has a proportionate reason to engage in an act of material cooperation.[60]

For example, the tradition makes an important distinction between remote material cooperation and proximate material cooperation. As an act of material cooperation gets closer to the wrongful act in time, space, or causal connection, the harder it is to justify.[61]

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?[63]

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

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[63] *See* Kaveny, *supra* note 49, at 285-86 & n. 14.

[64] *See* John Paul II, *Marriage Indissolubility and the Roles of Judges and Lawyers (Address to the Roman Rota)*, 31 ORIGINS 597, 601 ("For grave and proportionate motives [judges] may act in accord with the traditional principles of material cooperation."); *see also* Hartnett, *supra* note 47, at 246-48 (discussing judicial cooperation in the context of divorce); BERNARD HÄRING, 2 THE LAW OF CHRIST 511 (1963) ("Should [the judge] in no way be able to prevent

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

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

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

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

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

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[68] Heft, *Abortion and Proportionate Reasons*, *supra* note 1, at 271.
[69] *Id*. (emphasis added).
[70] *Id.* at 264.
[71] *Id*. at 264-65; *cf. id*. at 271 ("Even if they are right about the moral gravity of [abortion and embryonic stem-cell research], and I believe that they are, it does not necessarily follow that voting for a pro-life candidate, for such reasons, makes the most sense.").

such a vote: "if a Catholic voted for a candidate despite his or her pro-choice stance, it would not necessarily be sinful."[72]

The remarks of Fr. DiNoia and Archbishop Levada suggest that "issues which require a person to employ proportionate reasoning on the issue of voting are matters of prudence on which people of good will might well differ."[73] Indeed, the bishops of Virginia stated that voters should approach the question of "proportionate reasons" in this way:

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

The gravity of the moral evil of abortion clearly is a crucial consideration in assessing whether it is morally appropriate to vote for a particular candidate. Yet a voter should also consider seriously the degree to which a particular candidate is likely to be able to diminish the actual incidence of abortion, especially in light of the current constitutional status of the right to make the

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[72] *Id*. at 265; *see also id*. ("Several bishops, including Bishop John Kinney of St. Cloud, Minnesota, warned against denying a pro-choice candidate communion, and added that 'no human is capable of judging someone else's relationship with God.'").
[73] *Id.* at 271.
[74] Bishops of Virginia (Bishop Paul Loverde and Bishop Francis DiLorenzo), *The Voter's Responsibility*, 35 ORIGINS 370, 371 (November 10, 2005) (emphasis added); *see also* note 9 *supra* (discussing the Catholic understanding of conscience); *cf*. Quinn, *supra* note 35, at 335 ("[N]or is it prudent for bishops to tell the Catholic people which among several candidates they should vote for.…The voting booth, like the confessional, admits only one person at a time. There each of us stands before our conscience. But not

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

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

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

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

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

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

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

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

proceedings associated with capital punishment? Justice Harry Blackmun declared toward the end of his time on the Supreme Court that he could no longer "tinker with the machinery of death."[78] 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*,[79] the Court opened up some new space for abortion regulation, while reaffirming the core holding of *Roe v. Wade*.[80] The constitutional law with respect to abortion after *Casey* has three central components: 1) prior to viability, women have a constitutionally protected liberty interest to make the decision to have an abortion. 2) Pre-viability regulation of abortion is unconstitutional if it places an undue burden on the woman's right to choose to have an abortion. 3) After viability, the state is free to prohibit abortion, except where appropriate medical judgment deems the abortion to be necessary to preserve the life or health of the mother.[81]

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

[78] 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

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

The joint opinion makes two points that are relevant to the topic of this Essay. It first develops an argument that attempts to explain how constitutional protection for the woman's decision to terminate her pregnancy is supported by a line of precedents interpreting the due process clause of the Fourteenth Amendment.[82] 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.[83]

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*."[84] In plain English, Justices O'Connor, Souter, and Kennedy are saying that, even if we think *Roe* was wrongly decided, it is a

[82] 505 U.S. at 846-53
[83] 505 U.S. at 850 ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.").
[84] 505 U.S. at 853.

for the reasons just described does not necessarily share in the intent of a woman who chooses to have an abortion. Accordingly, voting to uphold *Roe* does not constitute illicit formal cooperation.[88] Moreover, voting to uphold *Roe* does not *require* anyone to engage in any immoral act; it does no more than say that the law *cannot prohibit* a particular sort of immoral act. As Justice Scalia has said, "a judge . . . bears no moral guilt for the laws society has failed to enact."[89] Deciding not to overrule *Roe* might, then, accurately be characterized as a form of nonculpable remote, material cooperation, which can be justified by the judge's duty to be faithful to his oath to uphold the law as he understands it.[90]

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

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

[89] 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.

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

specific Catholic duty to use their power on the bench to restrain abortion.[91] 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.[92]

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

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[91] 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

unconstitutional the federal Partial-Birth Abortion Ban Act of 2003.[94] 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.[95] The late Judge Richard Conway Casey of the U.S. District Court for the Southern District of New York faced this situation in the case of *National Abortion Federation v. Ashcroft*.[96]

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

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[94] 18 U.S.C. §1531 (2004 ed., Supp. IV).
[95] I am assuming here that the judge sincerely believes that the conclusion he or she has reached is the proper legal conclusion as a matter of constitutional law.
[96] 330 F. Supp.2d 436 (S.D.N.Y. 2004), *aff'd sub nom*. National Abortion Fed. v. Gonzales, 437 F.3d 437 (2d Cir. 2006), *vacated*, 2007 WL 1454322 (2d Cir. May 16, 2007) (noting that the plaintiffs conceded that *Gonzales v. Carhart* precluded relief on their facial challenge to the federal ban).
[97] "Any physician who, in or affecting interstate or foreign commerce, knowingly performs a parital-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." 18 U.S.C. §1531(a). *See also* 18 U.S.C. §1531(b)(1) (defining the term "partial-birth abortion").
[98] 530 U.S. 914 (2000).

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

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

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

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

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[99] 330 F. Supp.2d at 492-93. The Supreme Court in *Gonzalez v. Carhart* noted that "*Stenberg* has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty." 127 S. Ct. at 1638. The *Carhart*

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

Case #2

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

[101] For an argument that neither the demands of a hierarchical judicial system nor fidelity to the rule of law requires a lower court judge to enforce a "controlling" precedent that the judge concludes is lawless and immoral, see Paulsen, *supra* note 29, at 82-88 (urging lower court judges to "underrule" *Roe* by refusing to be bound by a lawless precedent). "So long as the lower court may still be reversed by the higher court, there is no interference with either the 'supremacy' of the Supreme Court or the idea of the rule of law." *Id*. at 84; *see also id*

judge be morally complicit in the minor's abortion if he or she issued such an order?[107]

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

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

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[107] The principle of cooperation also structures the analytical framework that applies to the question of whether or not an attorney who believes that abortion is a grave moral evil can licitly represent a minor in a parental involvement bypass hearing. *See* Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 FORDHAM L. REV. 1339, 1354-59, 1359 (1997-1998)

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

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

[110] *Cf.* Larry Cunningham, *Can a [illegible] (. LaC) [illegible] If she decided [illegible] Unt. [illegible] (se) [illegible] toral pr [illegible] a graSeti*

"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

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."[118] Judge McCarroll's argument is persuasive: if a judge cannot in good conscience issue an order to which a minor seeking an abortion may be legally entitled, the judge cannot reach an impartial decision in the case and should recuse himself or herself.[119]

Case #3

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

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

[119] *See* Hartnett, *supra* note 47, at 259; Treadwell, *supra* note 103, at 875 ("If the judge's moral beliefs about abortion are so embedded in his conscience that he cannot bring himself to neutrally apply the law, he should recuse himself from the case."); *id*. at 877 ("Based on the current state of the law on judicial recusal, state court judges who recuse themselves from cases where minors petition the court for a waiver of the parental consent laws do not violate their ethical obligations as a member of the judiciary. Rather, judges, who because of strongly held religious or moral beliefs about abortion cannot impartially apply the

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

The Church does not teach that the death penalty is an intrinsic evil. This makes imposition of the death penalty different from the intentional taking of innocent life involved in abortion. The current Catechism of the Catholic Church, however, does insist that the death penalty can only be used when it is the only possible way of effectively defending human lives against an unjust aggressor. When non-lethal means are available to protect people's safety, the state should limit itself to using those non-lethal means, because they are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person. Under contemporary conditions in a developed country like the United States, society can be adequately protected by keeping criminals securely incarcerated. [120] 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.[121] Can a judge who accepts the church's teaching on the death penalty participate in judicial proceedings that will culminate in the imposition of an unjust penalty? Can a Catholic judge cooperate

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

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

with the "machinery of death"? Justice Scalia, who rejects the Church's teaching on the death penalty,[122] 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.[123]

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

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[122] *See* Scalia, *supra* note 30.

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

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

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

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

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

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

[125] *Id.* at 321-24. *But cf.* Hartnett, *supra* note 47, at 242-46 (suggesting that, because a sentencing order might be understood not as permission to the executive to kill, rather than a command to kill, sentencing a defendant to death may not always amount to formal cooperation).
[126] Garvey & Barrett, *supra* note 124, at 324-25.

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

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

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

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[127] *Id*. at 325.
[128] *Id*. at 326-29.
[129] *Id*. at 328-29.

Grisez explains that "[s]ometimes the fact that 'good' people are involved [in a process that leads to wrongdoing] makes wrongdoing seem not so wrong and provides material for rationalization and self-deception by people tempted to undertake the same sort of wrong. . . . [O]ften the material cooperation of 'good' people in wrongdoing leads others to cooperate in it formally."[130]

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

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We could avoid some difficult questions by fleeing from participation in public life in an effort to insulate ourselves from any risk of ever cooperating in another person's wrongful action.[138] But this would be a serious mistake. Bernard Häring puts the issue clearly in focus:

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

The gospel calls us to cooperate with God's love at work D(smugffe6(rsot)TjETEMCyii8s.Tf

and sin,[141]