

## CULTURAL CHANGE AND "CATHOLIC LAWYERS"

*Stephen F. Smith*<sup>†</sup>

### I. INTRODUCTION

If there is anything that America definitely does not need, it would seem, it is more lawyers. According to one survey, close to seventy-five percent of those surveyed believe that the United States has too many lawyers.<sup>1</sup> In one sense, the public seems to have a point. Over the last thirty years or so, the number of lawyers practicing in the United States has almost tripled to current levels of roughly 900,000 practicing attorneys.<sup>2</sup> To this number, our nation's law schools add another 35,000 attorneys annually.<sup>3</sup>

To put these figures in perspective, American lawyers represent about thirty-five percent of the total number of licensed attorneys in the world, although the popular press has occasionally reported estimates ranging as high as sixty-five or seventy percent.<sup>4</sup> Regardless of what the actual percentage is, it is clear that the United States has far more attorneys on a per capita basis than any of the other industrialized nations of the world.<sup>5</sup> Given these indications

---

<sup>†</sup> Associate Professor, University of Virginia School of Law. This comment is based on my speech at the Red Mass banquet hosted by the St. Thomas More Society at the University of Virginia on October 1, 2000. I thank the *Ave Maria Law Review* for the opportunity to submit this comment on this historic occasion, and Mary Ann Glendon for her comments on the speech on which this comment is based. I am also grateful to James Gordley, Stephen Safranek, and Augustine Thompson, O.P. for their gracious assistance with this project. I alone am responsible for any remaining errors.

1. Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 989 (1998).

2. *Id.* at 990.

3. *Id.* at 991.

4. Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 77-79 & n.10 (1993).

5. *Id.* at 80 (challenging the higher estimate but arguing that, even with the lower estimate justified by available data, "the United States has supported far higher numbers of lawyers per capita than nations with comparable economies"). It is important to note that the discussion

that we are the most overlawyered nation on earth, if not in all of human history, a new law school would seem to rank just about dead last on the list of what this country needs.<sup>6</sup>

In spite of this, the purpose of this special inaugural law review issue is to commemorate the founding of a new school, the Ave Maria School of Law. It is an honor for me to be able to share in the joy and pride that everyone associated with Ave Maria understandably feels on this important occasion. Even so, it is worth asking why: why start a new law school, of all things, given the figures quoted above?

One answer might be that this new law school will serve students who cannot gain admission to other law schools. This answer might suffice for other new law schools, but not for Ave Maria. The students Ave Maria has admitted in its first three years are bright, well-credentialed students. All of them could have received (and, presumably, did receive) offers of admission to other law schools.<sup>7</sup> Indeed, many Ave Maria students would be competitive at top-tier law schools. I personally know of one Ave Maria student, for example, who declined an offer of admission at my law school, the University of Virginia (which is currently ranked the seventh-best law school by *U.S. News and World Report*),<sup>8</sup> to matriculate at Ave Maria. Undoubtedly, there are other Ave Maria students who have also declined opportunities to go to other fine law schools. Lack of better educational opportunities, therefore, does not explain the founding of Ave Maria.

---

here focuses on the total number of practicing attorneys and not the very different question of the *allocation* of those attorneys. It is possible to have too many lawyers overall and a shortage of attorneys in a particular area of specialty. One area of continuing shortage of legal talent, compared with the need for legal representation, is representation, civil and criminal, for indigent and middle-class clients. As Professor Deborah Rhode correctly notes, "Corporations and individuals with deep pockets or large potential damage claims may encounter a glut of would-be advocates. Ordinary Americans with ordinary needs do not." Rhode, *supra* note 1, at 992.

6. The argument that the United States has "too many" lawyers obviously assumes a normative benchmark of what the "right" number of lawyers is. It could be argued that, even though the United States has the most lawyers, in per capita terms, of all industrialized nations, the kind of complex, law-based society we have justifies the greater number of practicing attorneys. Galanter, *supra* note 4, at 80 (questioning the claim that America has too many lawyers). Rather than try and justify widely held intuitions that there are too many lawyers in the United States, I simply note, without purporting to solve, the benchmark problem. The question whether indeed we have too many, or too few, attorneys is not central to my argument.

7. Fully one-quarter of the incoming class scored in the top ten percent on the Law School Admission Test (LSAT). <http://www.avemarialaw.edu/prospective/index.cfm> (on file with the Ave Maria Law Review).

8. *Schools of Law: The Top Schools*, *U.S. News & World Report*, April 15, 2002, at 64.

Another possible answer is that Ave Maria responds to increased demand for Catholic legal education. There are several problems with this answer. First, as far as I know, there is no evidence that Catholic legal education is in greater demand now than previously. Indeed, in the seventy years before Ave Maria was founded, only four Catholic law schools opened in the United States.<sup>9</sup> This seems to suggest that existing Catholic law schools have long been sufficient to accommodate the demand for Catholic legal education. From a Catholic perspective, it would be nice if there were a renaissance in Catholic legal education, but that does not appear to be the case at the present time.<sup>10</sup>

Second, there are many identifiably Catholic, well-established law schools already in existence: most prominently, the University of Notre Dame and the Catholic University of America. When you include the two dozen other law schools that are less identifiably Catholic, it becomes clear that there has been no shortage of opportunities to receive a legal education in a school with some kind of Catholic affiliation. Finally, even if there were such a shortage, many of the students Ave Maria admits have strong enough credentials to gain admission to other Catholic schools. The fact that they have chosen Ave Maria over other Catholic school options suggests that there is something special, and particularly attractive, about Ave Maria.<sup>11</sup>

---

9. M.L. Elrick, *Higher Law: Ave Maria Law School May Produce a Very Different Kind of Lawyer*, NAT'L L.J., May 14, 2001, at A18.

10. In fact, one Catholic law school, the University of Detroit-Mercy, is experiencing ominous declines in enrollment. Katherine S. Mangan, *Law School at U. of Detroit-Mercy Will Lay Off 7 of 25 Full-Time Faculty Members*, CHRON. OF HIGHER EDUC., Nov. 6, 1998, at A18 (noting that the law school has faced a "50-per-cent enrollment decline over the past seven years"). Nevertheless, the statements in the text may be unduly pessimistic about the current state of Catholic legal education. Over the last few years, three new Catholic law schools have come into being, just one short of the total for the preceding seventy-year period: Ave Maria, the University of St. Thomas (St. Paul, Minnesota), and Barry University (Orlando, Florida).

11. Critics of Ave Maria have suggested that generous scholarships are the only reason Ave Maria students choose to attend Ave Maria. Noted Church dissenter Robert E. Drinan, S.J., for example, has been quoted as saying that Ave Maria "'seek[s] to buy talent with money from its billionaire patron.'" Richard John Neuhaus, *While We're At It*, FIRST THINGS, Nov. 1999, at 90 (quoting article by Drinan in *National Catholic Reporter*). Scholarships are, to be sure, an inducement for students, particularly in light of the skyrocketing costs of higher education. That is why granting scholarships is a common admissions strategy for all institutions of higher learning with the resources to do so, including Drinan's own Georgetown University and top schools like Harvard or Yale. There is nothing sinister about offering scholarships to qualified applicants (or using competitive salaries to attract talented faculty). Indeed, scholarships are especially justified at new law schools lacking proven track records with legal employers.

It will surprise no one that a necessary precondition to membership in the law professoriate is the conviction that students are wrong on just about everything. That said, however, I think the students who chose Ave Maria over other law school options were right: there is indeed something special about this new experiment in legal education. Many Catholic students, like many students of other faiths, enter law school simply for secular purposes, typically to receive the training necessary to qualify for a high-paying law firm job following graduation. For such students, Ave Maria and other religiously affiliated law schools will have no particular attraction: the main selection criteria will be secular concerns such as a law school's educational quality and its career placement record. In my terminology, these students see themselves as future lawyers who *happen* to be Catholic.<sup>12</sup>

Ave Maria seeks to produce a different kind of lawyer. With apologies for what is admittedly not the most ecumenical of terminology, I call that kind of lawyer the "Catholic lawyer."<sup>13</sup> This type of lawyer sees a connection between his religious faith and his legal training. For him, being a lawyer is a kind of lay vocation, in which legal training is either used in direct service of the Church or consistently with notions of Catholic ethics and social responsibility. Not surprisingly, many students who aspire to be Catholic lawyers will find the prospect of receiving a high-quality legal education at Ave Maria quite attractive. Legal education is enhanced there by a climate that stresses the connections between law and morality and

---

Students at such schools take greater risks in terms of post-graduation job opportunities as compared to students at more established schools. My sense is that Ave Maria students took those risks, not because they have been "bought off," as Drinan might suggest, but rather because they find Ave Maria's approach to legal education attractive.

12. This terminology is not intended in any way to denigrate or question their religious commitment. In fact, thinking back to the days when I was applying to law school, I would put myself in the category of an aspiring lawyer who happened to be Catholic. Even though I took my Catholic faith seriously, educational quality was the overriding consideration in deciding where I would go to law school, and I viewed my future legal career solely in secular terms. The point is simply that for lawyers who happen to be Catholic and students who aspire to be such lawyers, their professional goals and aspirations are entirely secular, having no connection with their religious faith.

13. I phrase the central dichotomy pursued in this comment, that is, the dichotomy between lawyers who happen to be Catholic, on the one hand, and Catholic lawyers, on the other, in terms of Catholics simply because Ave Maria is a Catholic law school attended mostly (but not entirely) by Catholics. Although my terminology is not ecumenical, the basic point is ecumenical because the same basic dichotomy exists with regard to law students and lawyers of other faiths.

the need to understand law in the context of the higher law to which the law aims and all persons of faith understand themselves to be bound.

I should concede at the outset that the central concept of this comment, the “Catholic Lawyer,” may seem rather anomalous to some. Lawyers, we know, are essential players in the administration of justice, and the administration of justice, in turn, is a governmental function. Ever since the time of Thomas Jefferson, however, we have been led to believe that, in his words, there is a “wall of separation” between church and state.<sup>14</sup>

In a separationist regime, as ours purportedly is, how can there possibly be such a thing as a “Catholic lawyer”? At best, it would seem, the most we can be is lawyers who *happen* to be Catholic, or, with a more Romanist twist, Catholics who *happen* to be lawyers. In other words, if the wall of separation is not to be breached, what we do in our professional lives—in our law offices or classrooms, or in the government arena—can have nothing to do with what we think or do in our spiritual lives. The one activity is to be governed by “law” and “reason”; the other, by mere belief.

I would like to challenge Ave Maria students to take a markedly different (dare I say, more Catholic?) view of themselves and of our common identity and vocation in the Church. Our Catholic beliefs not only *may* properly influence and guide our professional activities as lawyers; they *must* do so. Otherwise, we cannot perform our vocation in the Church, not to mention our ethical duties as lawyers to work for the improvement of the administration of justice. In short, the term “Catholic lawyer” is not anomalous at all; instead, as Francis Cardinal George has suggested, it reflects a moral imperative binding on each of us.<sup>15</sup>

---

14. Jefferson coined the phrase “wall of separation between Church & State” in his 1802 letter to the Danbury Baptist Association, which had solicited his support for their petition for the repeal of Connecticut’s laws establishing the Congregational Church as the state’s official church. PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 144-89 (2002) (detailing the circumstances surrounding Jefferson’s fateful letter). The Supreme Court later came to endorse the Jeffersonian metaphor as capturing the central meaning of the Establishment Clause of the First Amendment. *See, e.g., Reynolds v. United States*, 98 U.S. 145, 164 (1878). As Professor Hamburger carefully documents, the widespread endorsement of separation during the nineteenth century resulted from pervasive anti-Catholic bias in America. HAMBURGER, *supra* at 193-251.

15. Francis Cardinal George, O.M.I., *Law and Culture*, 1 AVE MARIA L. REV. 1, 17 (2003).

## II. "LAW AND CULTURE": A PARTIAL RESPONSE TO CARDINAL GEORGE

Before spending the balance of this comment developing these themes in somewhat greater detail, I should address Cardinal George's insightful remarks concerning the connection between law and culture. His central point, which I take to be that law and culture reinforce and shape one another in important ways, is not only right but, in my view, unassailably so. Immoral laws, such as slavery laws and the "Black Codes" adopted in the Deep South following the abolition of slavery,<sup>16</sup> do more than simply produce immoral results for those then living; they distort the moral compasses of the citizenry to accept as moral what is in actuality immoral, and that distortion becomes an illegitimate legacy handed down to future generations.<sup>17</sup> Similarly unassailable is Cardinal George's further point that the cultural and legal status quo on any issue is morally binding upon citizens only to the extent that it is not morally unjust, a principle that is central to the widely accepted concept of civil disobedience.<sup>18</sup> Civil disobedience acts as a counterweight to the corrosive messages that immoral laws send by forcing those who would otherwise support those laws to confront the injustice of those laws and (hopefully) recalibrate their consciences to recognize that injustice for what it is.<sup>19</sup>

---

16. *See generally* THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* (1965).

17. Given the corrosive messages that slavery, Black Codes, and "Jim Crow" laws sent to generations of white Southerners, the long history of lynching blacks (which continued well into the twentieth century) is hardly surprising. Equality before the laws is an essential outgrowth of human dignity, and so by denying blacks legal equality, the laws taught that blacks were less than human and hence deserving of the inhumane (and, indeed, barbaric) practice known as lynching. For a comprehensive study of lynching in the American South, see PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* (2002).

18. *See, e.g.*, THOMAS AQUINAS, *SUMMA THEOLOGICA*, Part I-II, Question 96, Article 4 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911) ("laws may be unjust through being opposed to the Divine good: such are the laws of tyrants inducing idolatry, or to anything else contrary to Divine law: and laws of this kind must nowise be observed"). To those who would regard this as a lawless principle, I respond, as Martin Luther King, Jr. did, that "an individual who breaks a law that conscience tells him is unjust and willingly accepts the penalty . . . is in reality expressing the very highest respect for the law." Martin Luther King, Jr., *Letter from a Birmingham Jail*, in *LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY* 453, 459 (David Dyzenhaus & Arthur Ripstein eds., 1996). For a more extensive treatment of civil disobedience, see JOHN RAWLS, *A THEORY OF JUSTICE* 319-43 (2d ed. 2000).

19. As John Rawls has written: "The persistent and deliberate violation of the basic principles of [the public conceptions of justice] over any extended period of time, especially the infringement of fundamental equal liberties, invites either submission or resistance. By engaging in civil disobedience a minority forces the majority to consider whether it wishes to

From this sure footing, Cardinal George urges that “Catholic jurists and lawyers, judges and legislators should work to shape a legal system informed by a sense of right and wrong transcendent to political manipulation,” that is to say, a “culture open to the transcendent truths of faith.”<sup>20</sup> This laudable prescription, I think, warrants a bit more qualification than Cardinal George gives it. His argument is compelling in the case of private citizens and legislators, but it is more complicated when applied to judges.

The complexity comes not from the impossibility of imagining civil disobedience by judges. One can readily imagine a judge refusing to reach a legally required outcome in a case before him based on a conviction that the outcome in question would be morally unjust. The most dramatic recent example may be the “abolitionist” position adopted by Justices William Brennan, Thurgood Marshall, and Harry Blackmun that the death penalty is always unconstitutional.<sup>21</sup> Of course, unlike the classic case of civil disobedience, these Justices did not explicitly rest on moral grounds; instead, they claimed that the death penalty always violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. Even so, given how weak the legal and empirical support for that claim is, it is best understood, I think, as a refusal to follow the law on the grounds that laws authorizing capital punishment are morally unjust.<sup>22</sup>

---

have its acts construed in this way, or whether, in view of the common sense of justice, it wishes to acknowledge the legitimate claims of the minority.” RAWLS, *supra* note 18, at 321.

20. Cardinal George, *supra* note 15, at 17.

21. See, e.g., *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari); *Hammitt v. Texas*, 448 U.S. 725, 726 (1980) (Marshall, J., dissenting from grant of petitioner’s motion to withdraw certiorari petition); *Gregg v. Georgia*, 428 U.S. 153, 227-30 (1976) (Brennan, J., dissenting).

22. In terms of the obvious problems with the abolitionist position, the Constitution explicitly endorses capital punishment in several places, belying any original claim that executions are always unconstitutional. See U.S. CONST. amend. V (providing that persons may not “be deprived of life . . . without due process of law”); U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life . . . without due process of law.”); U.S. CONST. amend. V (providing that persons may be “put in jeopardy of life” once but not “twice”). Moreover, even accepting the modern view that “evolving standards of decency” can, over time, invalidate previously accepted punitive measures as cruel and unusual punishment, *Atkins v. Virginia*, 122 S. Ct. 2242, 2247 (2002), there continues to be a strong national consensus that the death penalty is an appropriate sanction for murder. See, e.g., Jim Yardley, *Number of Executions Falls For Second Straight Year*, N.Y. TIMES, Dec. 14, 2001, at A24 (citing polling data finding that, despite recent calls for a moratorium on executions, “65 percent of Americans support[] capital punishment”). The Brennan/Marshall/Blackmun view, therefore, is viable only as a normative claim of what the law ought to be with regard to capital punishment. Incidentally, by describing

What I find so striking about this sort of “judicial civil disobedience” is not that it happens, but rather that it happens so infrequently. Can it really be that in a society where courts have the last word on the most divisive issues of the day, such as abortion and capital punishment, judges are only rarely called upon to reach results that they find to be morally objectionable? This hardly seems likely, particularly as to judges serving on lower courts.<sup>23</sup> Whatever else might be said of the judiciary, there is no reason to think that it alone, in contrast to all other branches of government and segments of society, is immune from the divisiveness of these thorny issues.<sup>24</sup>

If, in some set of cases, there is a clear divergence between the judge’s individual sense of justice and the legally required result, why do we not see more instances of judicial civil disobedience? The most plausible answer is that even now, decades after the supposed triumph of legal realism, most judges do not give dispositive effect to their moral intuitions in deciding cases.<sup>25</sup> On this view, moral

---

the abolitionist position as a moral claim, I do not in any way deny the gravity of the moral difficulties associated with capital punishment, difficulties that the Holy Father has recently emphasized. See, e.g., Pope John Paul II, *Evangelium Vitae* [*The Gospel of Life*] ¶ 56 (St. Paul ed. 1995). *Contra* Antonin Scalia, *God’s Justice and Ours*, FIRST THINGS, May 2002, at 20-21 (rejecting the discussion of capital punishment in *Evangelium Vitae* and the parallel provisions of the new Catechism as misguided and contrary to Tradition).

23. Unlike justices on the Supreme Court, lower court judges are bound by prior decisions of higher courts and therefore must, on pains of reversal, follow precedent from higher courts, however morally objectionable they find the result compelled by precedent. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) (explaining that “longstanding doctrine dictates that a court is *always* bound to follow a precedent established by a court ‘superior’ to it.”). At the Supreme Court level, by contrast, individual justices are free to file repeated dissents, as Justices Brennan, Marshall, and Blackmun did on the death penalty, from prior precedents they deem to be misguided. See Suzanna Sherry, *Justice O’Connor’s Dilemma: The Baseline Question*, 39 WM. & MARY L. REV. 865, 870 (1998).

24. Indeed, the prevalence of 5-4 decisions in these controversial areas confirms that the Supreme Court is as deeply divided as the rest of the nation on many of these matters. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (rejecting claim that the Boy Scouts must accept openly gay scoutmasters); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (calling into question constitutionality of racial preferences); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirming constitutional right to abortion); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting constitutional right to engage in consensual homosexual conduct); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (striking down racial quotas in admissions but seemingly endorsing use of race as a plus-factor). This Term, the Supreme Court will decide whether to overrule *Bowers* and will revisit the constitutionality of racial preferences in college admissions. See *Lawrence v. Texas*, 123 S. Ct. 661 (2003); *Grutter v. Bollinger*, 123 S. Ct. 617 (2002).

25. As a descriptive matter, Richard Posner (himself an appellate judge) argues that judges generally steer clear of arguments based on moral philosophy in order to “preserve the autonomy of law.” Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV.

intuitions may come into play along with policy or other considerations when written law is truly ambiguous (or, as in areas governed by common law, nonexistent), but do not afford a basis for reaching results contrary to those required by positive law, fairly interpreted.<sup>26</sup>

Justice Antonin Scalia, perhaps the nation's most prominent Catholic jurist, has advocated a particularly strong version of this view, one that categorically denies the relevance of the judge's moral views to the task of adjudication. Although he has voted to overrule *Roe v. Wade*,<sup>27</sup> he insists that he would reject so-called "right to life" legal challenges to laws conferring a statutory right to abortion. "The States may, if they wish, permit abortion on demand," Scalia argues, because the Constitution, properly interpreted, simply does not speak to the subject of abortion.<sup>28</sup>

---

L. REV. 1637, 1701-02 (1998). Posner cites the Supreme Court's abortion and "right-to-die" cases as examples of cases where, despite the obvious relevance of substantial moral questions, all the Justices declined to take a position (explicitly, at least) on the moral question and rested on purely legal grounds for their decision. *Id.* at 1700-03. Another suggestion that judges elevate law over morality when the two conflict comes from the behavior of antislavery judges prior to the Civil War. Though strongly opposed to slavery, a famous study found that antislavery judges "almost uniformly applied the legal rules [concerning slavery]." ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 199 (1975).

26. This claim is difficult to reconcile with the activism of the Warren Court in criminal procedure. During the 1960s, the Court created a whole body of new constitutional rules governing all aspects of the criminal investigation and adjudication processes, processes that were historically subjected to very little, if any, federal constitutional scrutiny. *See, e.g.,* *Miranda v. Arizona*, 384 U.S. 436 (1966) (creating an elaborate scheme governing admissibility of custodial confessions); *Mapp v. Ohio*, 367 U.S. 643 (1961) (requiring state courts to exclude at trial evidence obtained in violation of the Fourth Amendment). These decisions by the Warren Court typically are not defended on grounds of legal correctness—an inquiry that, to the Court's defenders, "misses the point" because those decisions were about combating "institutionalized racism" in the criminal justice system, not "law" as commonly understood. Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156 (1998). If this characterization of the Court's jurisprudence is right, then perhaps the Warren Court should be seen as the exception that proves the rule, noted by Posner and others, that judges typically do not use their own moral beliefs as a guide to adjudication.

27. 410 U.S. 113 (1973); *see, e.g.,* *Stenberg v. Carhart*, 530 U.S. 914, 955-56 (2000) (Scalia, J. dissenting); *Casey*, 505 U.S. at 944 (Rehnquist, C.J., joined, *inter alia*, by Scalia, J., concurring in judgment in part and dissenting in part).

28. *Casey*, 505 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part); *see also, e.g.,* *Carhart*, 530 U.S. at 956 (Scalia, J., dissenting) (arguing that "the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether [abortion] should be allowed"). Justice Scalia was even more emphatic on this point in a recent article:

I do not believe (and, for two hundred years, no one believed) that the Constitution contains a right to abortion. And if a state were to permit abortion on demand, I

In my own area of study, criminal procedure, Scalia has expanded upon and generalized this point. In *Herrera v. Collins*,<sup>29</sup> the issue was whether it would be unconstitutional to execute an innocent person who was found guilty beyond a reasonable doubt in a trial free of prejudicial error. Rejecting “the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice,” Scalia argued that it is an “unhappy truth” (but a truth nonetheless) that “not every problem was meant to be solved by the United States Constitution, nor can be.”<sup>30</sup> On the Scalia view, then, there may be many instances in which a conscientious Catholic judge would find, after due consideration, that a morally repugnant law or practice challenged in court is nevertheless constitutional.

What, then, should a conscientious Catholic judge do once he finds himself at this fork in the road where law and justice diverge? I infer from Cardinal George’s inclusion of “Catholic jurists and . . . judges” in the exhortation to “create a culture open to the transcendent truths of faith” that, in his view, they should choose the

---

would—and could in good conscience—vote against an attempt to invalidate that law for the same reason that I vote against the invalidation of laws that forbid abortion on demand: because the Constitution gives the federal government (and hence me) no power over the matter.

Scalia, *supra* note 22, at 18. More recently, Justice Scalia has been in the news for his vigorous defense of the morality of capital punishment in light of contrary exhortations from the Holy Father. See, e.g., *id.* at 17. This debate is not directly relevant here because Justice Scalia sees no inconsistency between his legal and moral views in the case of the death penalty: he believes capital punishment to be both constitutional and, the Pope notwithstanding, perfectly moral. *Id.* at 20-21. It is, however, noteworthy that in discussing the death penalty, Justice Scalia insists that “my views on the morality of the death penalty have nothing to do with how I vote as a judge.” *Id.* at 17.

29. 506 U.S. 390 (1993).

30. *Id.* at 428 (Scalia, J., concurring). I take as rhetorical flourish, and not a serious statement of belief, Scalia’s aside that “If the system that has been in place for 200 years (and remains widely approved) ‘shock[s]’ the dissenters’ consciences, . . . perhaps they should doubt the calibration of their consciences.” *Id.* at 428. Even if one accepts tradition as a valid factor in constitutional interpretation, it is impossible to take seriously a claim that traditional practices are always morally valid. There is a long tradition of slavery, lynching, and invidious discrimination against blacks in this country, yet I trust that Justice Scalia would not defend the morality of those invidious practices. See, e.g., Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] ¶ 29 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 513, 540-41 (Nat’l Catholic Welfare Conference trans., St. Paul ed. 1967) [hereinafter *Gaudium et Spes*]. (“Every form of social or cultural discrimination in fundamental personal rights on the grounds of sex, race, color, social conditions, language, or religion must be curbed and eradicated as incompatible with God’s design.”). As St. Paul wrote to the Galatians: “There does not exist among you Jew or Greek, slave or free man, male or female. All are one in Christ Jesus.” *Galatians* 3:28.

moral result over the result dictated by law.<sup>31</sup> If this inference is correct, then I must respectfully disagree.

In our society founded upon self-government and committed to the rule of law, judges can claim no right to nullify duly enacted laws simply because they find them to be unfair or even morally repugnant. As long as the laws passed by Congress or state legislatures do not violate the Constitution, which, in our system, is “the fundamental and paramount law of the nation,”<sup>32</sup> judges are oath-bound to give those laws full effect. In other words, at the risk of sounding naive in some quarters of the academy, judges are bound to interpret and apply the law, not to make it.<sup>33</sup> If this is right, then judges cannot be lumped into the same category as other government actors: unlike members of the legislative and executive branches, judges are not permitted to use their personal assessments of the wisdom and morality of the laws as a basis for their official acts.<sup>34</sup>

---

31. Cardinal George, *supra* note 15, at 17.

32. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). To be sure, the framers subscribed to natural law and therefore regarded the Constitution as a partial reflection of the true “higher law.” Whether courts can enforce unwritten principles of natural justice—a question that was debated by Justices Chase and Iredell in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), and has been central to constitutional theory ever since—has been sharply debated by constitutional law theorists. The point I want to make here is that believers in natural law need not endorse what was traditionally described as noninterpretive judicial review. As Robert George has explained, positivist conceptions of the judicial role are “fully compatible with classical understandings of natural law theory.” ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 110 (1999). George elaborates as follows: “Natural law theory . . . does not imagine that the judge enjoys (or should enjoy) as a matter of natural law a plenary authority to substitute his own understanding of the requirements of natural law for the contrary understanding of the legislator or constitution maker in deciding cases at law. . . . To the extent that judges are not given power under the Constitution to translate principles of natural law into positive law, that power is not one that they enjoy; nor is it one they may justly exercise. For judges to arrogate such power to themselves in defiance of the Constitution is not merely for them to exceed their authority under the positive law; it is to violate the very natural law in whose name they purport to act.” *Id.* at 110-11.

33. *See, e.g.*, THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.”). Needless to say, it is inevitable that judges will “make” law in the limited, common law sense of that term by deciding present cases in accordance with legal principles declared in past cases or, in questions of interpretation, selecting the meaning to be ascribed to written texts from the range of permissible interpretive options. Such interstitial lawmaking by courts is different, both in kind and degree, from free-wheeling judicial policymaking.

34. Politics, as Richard John Neuhaus has said, is entirely different. It is “a moral enterprise . . . in the sense that it engages the questions of right and wrong, of good and evil.”

Of course, neither a solemn oath to follow the law nor positivist understandings of the judicial office can justify judges in performing immoral acts, just as, in the civil disobedience context, laws commanding immoral action do not bind the consciences of individual citizens. Adjudication itself, understood simply as a judicial declaration of the rights and obligations of the parties under the law, is a morally neutral act.<sup>35</sup> The laws that the judge, by virtue of his office, is required to apply and enforce may or may not be immoral, but the act of applying and enforcing those laws is not itself immoral. At worst, it would seem, a judicial decision giving effect to an immoral law might constitute, in theological terms, “cooperation with evil.”<sup>36</sup>

Importantly, not all cooperation with evil is immoral. The Church has traditionally distinguished between two types of cooperation with evil: “formal” and “material” cooperation. Formal cooperation occurs when the cooperator “shares in the immoral intention of the other,” whereas “material cooperation” occurs when the cooperator takes action that has the effect of facilitating the wrongdoer’s immoral act but “does not share in the wrongdoer’s immoral intention.”<sup>37</sup> Formal cooperation is “always immoral”; material cooperation, however, may not be immoral depending on “the importance of doing the act measured against the gravity of the evil, its proximity, the certainty that one’s act will contribute to it, and the danger of scandal to others.”<sup>38</sup>

The proper application of these concepts to the task of judging can be quite difficult and, not being an expert in moral theology, I am

---

RICHARD JOHN NEUHAUS, AMERICA AGAINST ITSELF: MORAL VISION AND THE PUBLIC ORDER 20 (1992).

35. Catholic moral theology distinguishes between various kinds of immoral acts. “Intrinsically evil” acts are acts that are always immoral and thus may never be performed in good conscience. See Pope John Paul II, *Veritatis Splendor* [*The Splendor of Truth*] ¶¶ 81-82 (St. Paul ed. 1993). Intrinsically evil acts are to be distinguished from other acts which may or may not be evil depending on the circumstances or the state of mind with which they are performed.

36. The discussion that follows concerning cooperation with evil is based on an unusually accessible treatment of the concept in John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 317-19 (1998).

37. *Id.* at 318-19. The concept of cooperation with evil is analogous to the doctrine of “aiding and abetting” (or “accomplice liability”) in the criminal law. A person who “aids and abets” the commission of a crime by a third party is himself guilty, as an accessory, of the crime committed by the third party. See, e.g., Model Penal Code § 2.06(3) (1962) (outlining contours of aiding and abetting liability). Such liability attaches only where the accomplice intends to “promot[e] or facilitat[e] the commission of the offense.” *Id.* § 2.06(3)(a).

38. Garvey & Coney, *supra* note 36, at 318-19.

reluctant to take a firm position on these questions. What follows, therefore, should be understood as tentative. With this caveat, let me say that a fair argument can be made that only a judicial act that specifically commands or gives permission for others to take immoral action can constitute formal cooperation with evil. In such a situation, the judge is going beyond merely declaring the rights and obligations of the parties under law. Instead, he intends that the immoral action occur (otherwise, why command or grant permission for it to be done?).<sup>39</sup>

Outside of this particularly problematic form of judicial action, I can think of no other kind of judicial action that constitutes an impermissible form of cooperation with evil. I am inclined to think that other, less direct types of judicial involvement with evil acts are, at worst, material cooperation. An apt illustration comes from the death penalty example previously discussed.

If capital punishment is sought in a case where the Church would regard it as immoral, Catholic judges may not, as I understand it, participate in proceedings intended to determine whether the defendant should be put to death—such participation, after all, would entail formal cooperation. This would leave open participation at other stages of death penalty cases, such as the guilt/innocence phase in the trial court and appellate or collateral proceeding to determine whether a capital conviction or sentence is legally erroneous. Such participation represents material cooperation only. Imposing a conviction for a capital offense, though a necessary step in the capital punishment process, is not a sufficient one because the life-or-death

---

39. Professors Garvey and Coney cite the entry of a death sentence by trial judges following a jury recommendation of death as an example of such formal cooperation; the order, as phrased in the federal system at least, orders the appropriate officials to put the defendant to death. *Id.* at 320-22. In the same vein, Justice Scalia adds that, like the trial judges who impose death in the first instance, appellate judges who, in the death penalty parlance, must independently reweigh the evidence to determine whether a defendant should be executed “are themselves decreeing death.” Scalia, *supra* note 22, at 18. I agree that, in both cases, such action constitutes formal cooperation, but the question is: cooperation with what? Formal cooperation is immoral only if it relates to an act that is “evil.” The Catholic Church has never taught, and does not presently teach, that capital punishment is intrinsically evil. Recent statements, such as those in *Evangelium Vitae* and the new edition of the *Catechism of the Catholic Church*, have emphasized careful attention to admittedly ill-defined prudential considerations on which the permissibility of execution depends in any particular case. If those considerations justify the death penalty, then execution in that case is morally permissible and does not constitute cooperation with “evil.” See generally Avery Cardinal Dulles, *Catholicism & Capital Punishment*, FIRST THINGS, Apr. 2001, at 30 (analyzing current Catholic teaching on capital punishment in light of the Magisterium, *Evangelium Vitae*, and other recent papal pronouncements).

question will depend on the result of the subsequent penalty phase of the capital case.<sup>40</sup> Additionally, even if they ultimately deny relief to a prisoner on death row who morally deserves life rather than death, it is material, not formal, cooperation for Catholic judges to participate in proceedings on appeal or in habeas corpus or other collateral attacks by the prisoner. As Garvey and Coney demonstrate, “To affirm [a death] sentence is not to approve it, but to say that the trial court did its job. What the court really decides is that the responsibility for life and death lies somewhere else.”<sup>41</sup>

To the extent evil should happen in the wake of a ruling that a particular practice is constitutionally permissible—in the example just discussed, execution of a defendant who deserves life rather than death—the judge does not share in the immoral intention of those who subsequently engage in the practice. He has refused to invalidate the practice, not because he thinks it is morally acceptable or desirable, but rather because he lacks the legal authority to do otherwise. The fact that he votes to uphold the practice on such narrow grounds has no tendency to lead third parties into moral error.<sup>42</sup> If I am right that this is material cooperation only, it would seem to be justified by the judge’s limited role in the judicial system and the attenuated link between the decision and the acts that individual citizens or government actors might (or might not) take in

---

40. Even if they do not deserve death, retributive justice demands that murderers, like other criminals, should be convicted and punished for their crimes. See Garvey & Coney, *supra* note 36, at 324-25.

41. *Id.* at 328; see also *id.* at 326-29 (discussing appeals from capital convictions and sentences); *id.* at 329-31 (discussing participation in collateral attacks on capital convictions and sentences). For similar reasons, I think Justice Scalia is right in asserting that he “could in good conscience” refuse to invalidate statutes authorizing abortions, Scalia, *supra* note 22, at 18, for such a ruling simply says that, under our system, federal judges have no legal right to override the determination of the representative branches of government that abortion should be allowed.

42. The seriousness of the risk of scandal will clearly depend on the reasons the judge assigns for declining to invalidate an immoral practice. If he makes it clear that he has voted to uphold it because he has no authority under the law to invalidate it, then there would seem to be no real risk of scandal. On the other hand, if the judge goes further and makes arguments that affirmatively justify (or might reasonably be taken to justify) the practice—as, I fear, Justice Scalia has done in the context of his recent high-profile forays into the morality of the death penalty—then the danger of scandal is very real. Especially with someone as skilled and respected as Scalia rightly is, third parties might be drawn to the morally erroneous view that capital punishment is *always* morally permissible from Scalia’s vigorous claims that the Holy Father’s contrary view is an “uncongenial doctrine that everyone knows does not represent the traditional Christian view” and “would have . . . disastrous consequences” for both the Church and society. Scalia, *supra* note 22, at 21.

the future as an indirect result of the judge's refusal, in effect, to usurp jurisdiction that has not been granted him.

Given the limited role of the judge, it is the individual citizen and society as a whole and not the individual judge who have the responsibility for preventing societal evils that are not within the judge's jurisdiction to regulate. As Justice Scalia noted in *God's Justice and Ours*: "One may argue (as many do) that the society has a moral obligation to restrain [citizens from doing immoral acts]. That moral obligation may weigh heavily upon the voter, and upon the legislator who enacts the laws; but a judge, I think, bears no moral guilt for the laws society has failed to enact."<sup>43</sup>

To this extent, I disagree with Cardinal George's apparent suggestion that Catholic judges should use their judicial offices to prevent or strike down practices that, though permissible as a matter of law, are deemed immoral by the Church. The proper course for judges is to follow the law in the cases that come before them, mindful always of their duty to recuse in the event the law would require them to perform an intrinsically evil act, cooperate with evil in a manner that is morally impermissible, or take action that would scandalize others. The judge who does this is simultaneously faithful to his judicial oath of office, the Constitution and laws from which he derives his authority, and his moral duties. He has, in the word of Our Lord, "Render[ed] . . . unto Caesar the things which are Caesar's; and unto God the things that are God's."<sup>44</sup>

---

43. *Id.* at 18. Although I agree with Justice Scalia that society bears the moral blame for unjust laws and that judges cannot properly override valid laws based solely on the perceived injustice of those laws, I do not agree with his further claim that the only option for judges who cannot promise that they will follow the law in every instance is "resignation." See *id.* No judge can be certain that he will have the requisite impartiality in each and every case that will come before him over the life of his judicial career; a previously unforeseeable case may arise, for example, in which a close family member is a party or in which the judge has a direct financial interest. The cure for these types of conflicts is for judges to recuse themselves in such cases where they cannot be impartial or where their impartiality might reasonably be questioned. See 28 U.S.C. § 455 (2000) (federal recusal statute); Garvey & Coney, *supra* note 36, at 335 (arguing that recusal is the proper course for "the observant Catholic judge" asked to preside at a capital sentencing hearing). Needless to say, a judge may feel so strongly about an injustice that he may choose to resign his office, and the greater the injustice that confronts the judge and the more illegitimate the laws the judge is asked to enforce (the classic example is Nazi Germany, with its laws authorizing genocide and other persecution of Jews), the more compelling the argument for resignation becomes. See generally Stephen Ellmann, *To Resign or Not to Resign*, 19 CARDOZO L. REV. 1047 (1997). Scalia's position that judges *must* take that extreme step unless willing, in all instances, completely to put aside their consciences, however, is misguided and would have the perverse effect of driving from the bench judges with moral sensibilities.

44. *Matthew* 22:21.

### III. THE "CATHOLIC LAWYER"

Having noted my partial disagreement with Cardinal George's thesis concerning Catholic judges, I focus the remainder of this comment on his powerful call to action to Catholic lawyers—a point as to which he and I are on common ground. Catholics often are all too eager to join the law firm rat race to amass the largest number of clients and bring home the largest salary or partnership draw, yet Cardinal George is certainly right that their faith, not just their clients, firms, and mutual funds, places important demands on their professional lives. I will try and identify what I think some of these demands are, albeit in the somewhat unorthodox form of advice from a "big-firm survivor" to the lawyers of the future. Although unorthodox, I believe this format is especially appropriate as Ave Maria prepares to send its first group of students out into the rather daunting world of private law practice.

My argument will proceed in three parts. First, I will briefly sketch some of the problems that today's law students will face in law practice, problems that mirror larger problems in society. These problems, in my view, call for the intervention of the Catholic lawyer. Second, I refer to the model of the Catholic lawyer, Saint Thomas More, in the hopes of trying to define this concept. Finally, I close with some humble suggestions for law school graduates to put these principles in practice once they have embarked on their careers in the law.

#### 1. *The Need for the Catholic Lawyer*

Believe it or not, being a lawyer was once a noble thing. Lawyers were regarded as the guardians of the rights of the people, who ensured that government did not transgress its limits and invade the prerogatives of the citizenry.

Lawyers in days past had high-minded ideals: promoting the fair and ethical administration of justice and protecting the rights of all (both innocent and guilty) by insistence that government follow all due process. Although, then as now, lawyers made their livelihood by serving the needs of their clients, the lawyer traditionally did far more than act as a "hired gun" trained on whatever stood in the way of the client's self-determined objective. Rather, the lawyer served the vital role of trusted counselor, helping the client formulate ethical objectives for the lawyer to achieve. As Elihu Root famously put it, at

one time any decent lawyer used to spend half his time “telling would-be clients that they are damned fools and should stop.”<sup>45</sup> It is for these reasons that de Tocqueville, in his famous study of the new American experiment, referred to members of the bench and bar as the fledgling republic’s only “aristocracy.”<sup>46</sup>

I prefaced this description with “believe it or not” because, unfortunately, the situation is very different in our time. In fact, for students who have worked as summer associates or paralegals in law firms, it should seem positively quaint. For quite some time now, the “love of money” that Saint Timothy warned us about,<sup>47</sup> not the love of justice, has been the guiding principle of lawyers, especially those practicing in the big-city mega firms that descend like locusts upon law schools nationwide to seduce young recruits into pursuing a professional route that, for most, is a one-way street to unhappiness and despair.<sup>48</sup>

The images of Thurgood Marshall risking his life to topple “Jim Crow” laws throughout the South,<sup>49</sup> and of Lewis Powell working behind the scenes in opposition to calls for “massive resistance” to desegregation in Virginia,<sup>50</sup> have faded in the nation’s psyche as a reflection of what lawyering is in America. In our time, the dominant image of the law profession is far less ennobling: the “ambulance chaser” seeking to plumb profits from the depths of human suffering (remember the flock of personal injury attorneys who descended on Bhoupal after the massive explosion there?),<sup>51</sup> the “Rambo litigator,” described by Professor Mary Ann Glendon of Harvard, whose “scorched earth” approach to litigation defense leads him to shred documents, resist even the most proper discovery or reasonable requests from opposing counsel, and bury court and adversary alike in an avalanche of pleadings in an unseemly game of attrition to wear down the plaintiff’s lawyer.<sup>52</sup> The lawyer of today all too often strives

---

45. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 37 (1994) (quoting Root).

46. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 276 (Knopf, Inc. 1994).

47. 1 *Timothy* 6:10.

48. See generally Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 *VAND. L. REV.* 871 (1999).

49. See JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (1998).

50. See JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.* 145-53, 179-80 (1994).

51. Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 *B.U. L. REV.* 723, 739-40 (1994).

52. GLENDON, *supra* note 45, at 51.

only to be “aggressive,” again, not in the pursuit of justice but only in the prurient, self-serving interests of his or her own clients. Put differently, “justice” to the contemporary lawyer *is* whatever his client wants to achieve and nothing more.

To be fair, this is not entirely a problem of the private practitioner. Like Peter crying, “Wolf!”, it seems that every execution is preceded by a flurry of hysterical pleas from appointed counsel that their clients are “innocent” even when DNA testing and other hard evidence conclusively proves otherwise. Also, in the comparatively few cases where DNA tests have called convictions into question, prosecutors bent on promoting their own reelection efforts or win-loss records have been known doggedly to oppose relief and defend gross miscarriages of justice.

The image of lawyers reached new lows with the wave of corporate scandals that shook Wall Street in 2002. Enron Corporation’s accounting practices, which papered over substantial losses that later bankrupted the energy giant, have become the epitome of corporate fraud, yet lawyers from Vinson & Elkins, retained by Enron to conduct an independent inquiry, found no improprieties other than “bad cosmetics.”<sup>53</sup> A lawyer also figured prominently in what the government believed was an illegal attempt by an outside audit firm to cover-up accounting scandals within Enron. A federal jury found Enron’s audit firm, accounting giant Arthur Andersen LLP, guilty of obstruction of justice in connection with investigations of Enron based on the behavior of Andersen’s in-house lawyer, Nancy Temple.<sup>54</sup> According to the prosecution, Temple not only prevented public disclosure of accounting irregularities, but also ordered the destruction of thousands of Enron-related documents.<sup>55</sup>

---

53. *Concerns Grow Amid Conflicts; Officials Seek to Limit Probe, Fallout of Deals*, WASH. POST, July 30, 2002, at A1 (quoting Vinson & Elkins report to Enron). Federal regulators had a very different view. In addition to civil enforcement actions brought by the Securities and Exchange Commission, the Department of Justice has pursued criminal charges against various Enron insiders, including former chief financial officer Andrew S. Fastow. *Fastow Charged with Fraud, Conspiracy in Enron Case*, WASH. POST, Oct. 3, 2002, at A1. Federal prosecutors promise additional Enron criminal charges in the near future. *U.S. Plans to Seek New Enron Charges; Accounting Officer, CFO’s Wife Targeted*, WASH. POST, Feb. 1, 2003, at E1. Meanwhile, Vinson & Elkins has been sued by Enron investors for helping Enron commit fraud. *See Judge Lets Suit Against Banks Move Ahead; Loans to Enron Subject to Claims*, WASH. POST, Dec. 21, 2002, at E1.

54. *See Andersen Guilty in Effort to Block Inquiry on Enron*, N.Y. TIMES, June 16, 2002, at 1.

55. *Id.* The House Energy and Commerce Committee has referred Temple to the Department of Justice for potential prosecution for perjury in her congressional testimony concerning Enron. *See* Letter from Hon. Billy W.J. Tauzin, Committee Chairman, to Hon. John

In a scandal that unfolded after the Enron story broke, Tyco International's former general counsel, Mark A. Belnick, has been sued by the Securities and Exchange Commission for joining other high-ranking corporate officers in "looting" Tyco.<sup>56</sup> New York prosecutors have also charged Belnick with falsifying business records concerning multi-million dollar, interest-free loans he received from Tyco. As one commentator put it: "In many ways, the Belnick story is a super-sized version of what so many other lawyers faced in the past year, with attorneys being sued, investigated and charged in the fallout of one bankruptcy or scandal after another. . . . [H]is fall from grace reflects the ethical deflation of the legal industry. . . ." <sup>57</sup>

Little wonder, then, that the jokesters have had their fun with our erstwhile profession:

Q: What do you call a criminal lawyer?

A: Redundant.

Q: How can you tell when a lawyer is lying?

A: His lips are moving.

My favorite:

Q: What is the difference between a catfish and a lawyer?

A: One is a disgusting, bottom-feeding scavenger, and the other is just a fish.

Chief Justice Rehnquist, known for his good sense of humor, is said to have stopped telling lawyer jokes: lawyers, he said, do not think such jokes are funny and nonlawyers fail to realize that they are jokes. Ours is indeed a tough line of work. In the public's eye, we rate right up there with used car salesmen and politicians, not exactly the best company in which to find oneself.

Lawyer jokes are not the only places to find indicia of this stark shift in the paradigm of the lawyer. Whereas, in the time of Shakespeare, only an obvious villain could proclaim "The first thing

---

Ashcroft (Dec. 17, 2002) available at [http://energycommerce.house.gov/107/letters/12172002\\_763](http://energycommerce.house.gov/107/letters/12172002_763) (on file with the Ave Maria Law Review).

56. *A Profession Under a Cloud*, WASH. POST, Dec. 30, 2002, at E1.

57. *Id.*

we do, let's kill all the lawyers,"<sup>58</sup> lawyers did not come off so well in Jim Carey's recent movie, entitled, appropriately enough, "Liar! Liar!"<sup>59</sup> Turns out that this portrayal was not so bad after all when "Devil's Advocate" hit the silver screen.<sup>60</sup> In that movie, Satan chooses, as his vehicle for conquering the world, a mega law firm located in New York City.

When we look at modern law firms, we can understand why the Prince of Lies would find himself quite at home in that environment. Professor Glendon's *Nation Under Lawyers* gives us a vivid, if rather chilling, peek into the modus operandi of the mega firm since the 1990s. Associates, lured to firms by promises of "quality of life" and reasonable chances at partnership, find themselves chafing under ever-increasing billable hour requirements that leave no time to start a family or pursue a vibrant spiritual life; some firms have annual averages of billable hours as high as 2,200 hours. By Professor Glendon's calculation, billing 2,200 hours annually (which exclude coffee breaks, timesheet preparation, lunch, trips to confession or daily Mass, and other "diversions" from client work) would require a lawyer to bill seven hours a day—which can take nine to twelve hours in the office to accomplish, mind you, six days a week, fifty-two weeks a year.<sup>61</sup>

After putting one's personal life on "hold" for eight to ten years at this break-neck pace, many partnership hopes are dashed as law firms seek greater leverage (the number of partners to associates) to boost per-partner earnings and paper profits. Even the lucky soul who makes partner still faces the sword of Damocles these days because partners not perceived to have a place in the New World Order's "eat what you kill" regime are being cast aside like disposable razors after decades of loyal, first-rate service and self-sacrifice. Again, to quote Professor Glendon, "just being a good lawyer isn't enough" anymore.<sup>62</sup> Not even close.

What does this have to do with the topic at hand, the "Catholic lawyer"? A lot, I think. The problem is not that lawyers are generally immoral people. Hollywood and the lawyer jokesters notwithstanding, there are a lot a fine, decent people who make their living as

---

58. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH*, act 4, sc. 2.

59. *LIAR! LIAR!* (Universal Pictures 1997).

60. *DEVIL'S ADVOCATE* (Warner Bros. 1997).

61. GLENDON, *supra* note 45, at 30.

62. *Id.* at 17.

attorneys. In my opinion, mega law firms have become inhumane sweatshops because the good people, Catholic or otherwise, who toil in them have bought into the radical Jeffersonian separation of church and state, of faith and law: they have *rejected* the model of the Catholic lawyer that the Church enjoins upon us.

When they are at home, they are moral, perhaps they even go to church regularly, but they check their morality—the religiously based sense of right and wrong in the words of George Washington and, more recently, Senator Joe Lieberman<sup>63</sup>—at the door when they enter their law office. From that point until they get home again (whenever that might be), they are Rambo. They turn a blind eye to lawbreaking by corporate clients and fight to the death to drive up their adversary's litigation costs, euphemistically called creating "settlement pressure." They scheme to steal business from other firms and, within the firm, to appropriate to themselves a larger share of the pie at the expense of their partners, associates, and support staff. Rambos allow their drive for higher billable hours to crowd out pro bono representation to indigents and public interest groups unable to pay market rates for legal services.

Even if they personally choose not to sully their hands with any of these unprofessional (and, I would say, *unethical*) activities, and there are some who do not, they remain silent while their more rapacious colleagues do the dirty work. As such, the lawyer who watches the dehumanizing effect of the mega firm and does nothing is guilty by association, just as Germans and others who stood idly by during the Holocaust sinned in so doing. Their acquiescence is a necessary condition for evil.

A "Catholic lawyer," to be distinguished, as I mentioned at the outset, from a lawyer who happens to be Catholic, would not accept this sorry state of affairs, at least not without a fight. A Catholic lawyer would be moved by the human costs of the mega firms'

---

63. Compare George Washington, Farewell Address (September 19, 1796), *reprinted in* THE AMERICAN REPUBLIC 72, 76 (Bruce Frohmen ed., 2002) ("Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. . . . And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds . . . reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.") with Richard Perez-Pena, *Lieberman Revisits Faith's Role in U.S.*, N.Y. TIMES, Oct. 25, 2000, at A24 ("Lamenting that it has become unacceptable in many circles to discuss religion, Mr. Lieberman, the Democratic nominee for vice president, said in a speech at the University of Notre Dame that 'we have gone a long way toward dislodging our values from their natural source in moral truth.'").

“profits *uber alles*” and would know that his ultimate aim, of necessity, is the attainment of justice not the maximization of profits. As Pope John Paul II has eloquently explained, markets are not moral, only efficient, and thus must be tempered by the Christian charity that springs from the essential realization of the immeasurable dignity and worth of each and every member of the human family.<sup>64</sup> Stripped of moral limits, markets tend to commercialism and materialism, corrosive influences that make it easier, Scripture tells us, for a camel to pass through the eye of a needle than for a rich man to enter the Kingdom of God.<sup>65</sup>

A Catholic lawyer would realize that the “love of money” is indeed the root of all evil. He would therefore reject a firm culture that exalts profits over people and rewards avarice over altruism. He would see the associate not just as a fungible input into the production process, and his fellow partners not as fitting targets for the equivalent of “no-fault divorce”; in each, the Catholic lawyer would see the resplendent face of the Risen Lord, who warns that “Whatsoever we do to the least of His brothers, we do unto Him.”<sup>66</sup> A Catholic lawyer, in other words, simply could not be Rambo.<sup>67</sup>

## 2. *A Role Model for the Catholic Lawyer*

“This all sounds good,” a skeptical reader may think, “but isn’t it unrealistic?” Tough? Yes. Unrealistic? No.

As the Pope explained in *Crossing the Threshold of Hope*, “[Jesus] demands never exceed man’s abilities. If man accepts these demands with an attitude of faith, he will also find in the grace that God never fails to give him the necessary strength to meet those demands.”<sup>68</sup> We could not ask for a better example than the one the Church has given us in Saint Thomas More, whom G. K. Chesterton

64. Pope John Paul II, *Centesimus Annus [On the Hundredth Anniversary of Rerum Novarum]* ¶ 34 (St. Paul ed. 1991).

65. *Matthew* 19:24.

66. *Matthew* 25:40.

67. As the Second Vatican Council taught, “there [can] be no false opposition between professional and social activities on the one part, and religious life on the other.” *Gaudium et Spes*, *supra* note 30, ¶ 43. The Council added that the contrary view, positing a “split between the faith which many profess and their daily lives deserves to be counted among the more serious errors of our age.” *Id.*

68. POPE JOHN PAUL II, *CROSSING THE THRESHOLD OF HOPE* 223 (Vittorio Messori, ed., Jenny McPhee and Martha McPhee trans., 1994).

once called the “greatest historical character in English history.”<sup>69</sup> More is a perfect example of what I mean by a “Catholic lawyer.”

More’s story is probably familiar to most of us.<sup>70</sup> Henry VIII wanted to divorce his wife, Catherine of Aragon, to marry someone who could give him a legitimate male heir. Upon ascending to the Lord Chancellor’s post, the highest office in the land, More faced the same conflict that each Catholic lawyer faces today: “Am I just a lawyer who happens to be Catholic, or something more?”

Henry tasked More with obtaining the papal dispensation necessary for the planned remarriage. Many clerics succumbed to royal pressure to sign a letter to the Pope demanding that he grant Henry’s request. Despite their clerical office, then, these clerics viewed themselves as people (whether lawyers or citizens) who happened to be Catholic. With their own convenient walls of separation thus in place, they could act in ways that plainly violated their Catholic duty. Their private beliefs on the validity of Henry’s course of conduct were as irrelevant to them as to Henry himself: Henry was the principal—the “client,” if you will—and so the only relevant question was how to do his bidding.

The question was posed to More: Would he, like so many others around him, succumb to Henry’s tyranny and join the rest of the hired guns? As a Catholic lawyer, it was obvious that More could not, even at the cost of his own life. More refused to sign the letter, and the Pope ultimately concluded that the marriage could not be dissolved. Henry responded by replacing the Pope with himself as “supreme head” of the Church of England, divorced Catherine, and married Anne Boleyn, who was pregnant with Henry’s child.

Out of protest, More refused to attend Boleyn’s coronation and eventually resigned as Lord Chancellor. Henry had More arrested and ordered to sign the Act of Succession, which recognized the King’s divorce and remarriage. In a close textual reading that would have made strict constructionists proud, More discovered that the Act only applied “to the extent the law of Christ allowed” and was willing, with that proviso, to sign because it negated the entire intentment, an act contrary to the law of the Church was also

---

69. G.K. CHESTERTON, *A Turning Point in History*, reprinted in *ESSENTIAL ARTICLES FOR THE STUDY OF THOMAS MORE* 501, 501 (R.S. Sylvester & G.P. Marc’hadour eds., 1977).

70. The discussion that follows of the martyrdom of St. Thomas More is based on JAMES MONTI, *THE KING’S GOOD SERVANT BUT GOD’S FIRST: THE LIFE AND WRITINGS OF SAINT THOMAS MORE* 289-325, 433-51 (Ignatius Press 1997).

contrary to the law of Christ. Henry, however, demanded that More also take an oath repudiating papal supremacy, which More would not do.

More was tried for treason. He was convicted on the basis of perjured testimony by a lawyer, Henry's solicitor general. More ascended the scaffold on Tower Hill in good spirits, jokingly telling the executioner to help him up to the chopping block but let him "sift for [himself]" in coming down. More declared to onlookers that he was dying "in and for the faith of the holy Catholic Church, the King's good servant but God's first."<sup>71</sup> The executioner begged and received More's forgiveness and More urged all assembled to pray for the King. With that, More was beheaded.

Saint Thomas More's conflict was starker than ours, but our conflict is no less real in this secular, some have said "post-Christian," world in which we live. If we are more than just lawyers who happen to be Catholic, we cannot wall off our faith lives from our professional ones. Our faith must constantly inform and enrich our professional activities, just as More's did. We cannot stand by while our law firms (any less than our governments) treat people in ways that are contrary to Christian dignity, nor can we accept a state of affairs in which lawyers grow richer and richer yet ignore their moral and legal ethic duties to help provide pro bono legal services to the needy. Likewise, as Catholic lawyers, we have to ensure that the goals of our representation are not unjust. Justice is not simply whatever our clients want to achieve; rather, it is the ethical yardstick against which we must measure what our clients want to do.<sup>72</sup> We

---

71. *Id.* at 449.

72. That said, I do not deny the familiar principle that "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social, or moral views or activities." MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (1983). In a legal system in which everyone (even the guilty) is entitled to representation, a lawyer obviously does no wrong by representing unpopular causes or clients who have acted unjustly. My point is simply that Catholic lawyers cannot, in good conscience, be *instruments* of injustice. Where injustice is the aim or necessary result of the representation—as it would be, for example, if a prosecutor were to defend a death sentence against a criminal defendant known to be innocent, or if a transactional lawyer were to help the client structure corporate deals for the purpose of defrauding investors—the lawyer cannot blithely go along with the client's wishes. To do so would not only be unprofessional, but also to entertain the "serious error[.]" rejected by the Second Vatican Council, that we as lawyers are not morally accountable for our professional activities. *Gaudium et Spes*, *supra* note 30, ¶ 43. Instead, the conscientious lawyer must try and convince the client to change his mind and, failing that, withdraw from the representation. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.2(e) (duty to counsel client as to prohibited objectives) & 1.16(a) (duty to withdraw). In other words, when justice and the client's wishes diverge, the

have to stand up in some meaningful way and be counted, as unpleasant or uncomfortable as that might and often will be.

In this country at least, our lives are not at risk for practicing our faith although we must not forget that our brothers and sisters in faith in China, Cuba, and elsewhere still face persecution and the prospect of martyrdom some four hundred years after More's execution. Still, speaking out in America from a religious point of view is far from costless. Instead of being murdered, we run the risk of being criticized or made pariahs if we question the dogmas and shibboleths of our increasingly irreligious age. So, even now, there are indeed costs to standing up for what *fides et ratio*, "faith and reason," tell us is right, yet each of us can have an impact on the culture, in our own little way, simply by caring enough to make the effort. As Chesterton wrote of More: "If there had not happened to be that particular man at that particular moment, the whole of history would have been different."<sup>73</sup> If we respond to our own version of the "Universal Call to Holiness,"<sup>74</sup> which lies at the heart of what it is to be Catholic lawyers, the same sentiment can be expressed, to some degree, about each of us because a good man or woman need not be a saint to change the course of history in some important way. All that is necessary is the will and resolve to stand up for what is right and a prayerful heart.<sup>75</sup>

### 3. *Some Practical Suggestions for Future Catholic Lawyers*

The final piece in the puzzle is to come up with a practical plan of action for how law students can emulate Saint Thomas More when they leave law school behind for the "real world." Everyone knows that practicality is not a trait correlated with law teaching. As a "law firm survivor" who recently slipped out through the exits after years

---

Catholic lawyer's model should be Thomas More, not Rambo or the hired gun. For a discussion of these and other client-selection dilemmas for Catholic lawyers in a variety of settings, see Teresa Stanton Collett, *Speak No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 *FORDHAM L. REV.* 1339 (1998).

73. CHESTERTON, *supra* note 69, at 501.

74. Second Vatican Council, *Lumen Gentium* [*Dogmatic Constitution on the Church*] ¶¶ 39-42 (1964), reprinted in *THE SIXTEEN DOCUMENTS OF VATICAN II* 107, 151-57 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1967).

75. I find myself increasingly drawn to St. Thomas More's "Lawyer's Prayer": "Give me the grace, good Lord, to set the world at naught; to set my mind fast upon Thee and not to hang upon men's mouths. To be content, to be solitary. Not to long for worldly company but utterly to cast off the world and rid my mind of the business thereof."

in practice, I think I can fake it, though. My basic advice would be to start out small. Except for those who become Managing Partner or achieve elected office or other great status in the community, there will be little any individual lawyer can do to change the culture of the mega law firm or society in some dramatic way. Nevertheless, both are essential ends for the Catholic lawyer. Cardinal George has told the story how he went to Rome for his first *ad limina* visit with the Holy Father to report on the Archdiocese of Chicago. The Pope took his written report, laid it on the table, and asked insistently (and probably somewhat impatiently) one question: "What are you doing to change the culture?"<sup>76</sup>

Cardinal George's response, which I will quote at some length, is illuminating on this point:

Taken by surprise, I spontaneously began to speak to the Holy Father about the Church's relation to the legal profession in Chicago, of the many contacts and gatherings, of the several Chicago priests who are also civil lawyers, of the pro bono work for the poor, of the Catholic law schools. . . . Then I backed up and began to explain that, in the United States, the law is a primary carrier of culture. In a country continuously being knit together from so many diverse cultural, religious, and linguistic threads, legal language most often creates the terms of our public discourse as Americans.<sup>77</sup>

The upshot, according to the Cardinal, was simply this: "*A vocation to make and to serve the law is a calling to shape our culture.*"<sup>78</sup>

It is for all of us to decide, each and every day of our lives, how we can best perform that vocation. What follows are some practical suggestions for aspiring Catholic lawyers to consider in making these important decisions for themselves.

*First*, heed the call of John Paul II to reinvigorate the Church's missionary zeal by doing your part in the "new evangelization."<sup>79</sup> The suggestion is not necessarily to pack off to far-off lands, for as the Holy Father has noted, it is the post-modern West that today cries out

---

76. Homily of Francis Cardinal George, OMI, Archbishop of Chicago, at the forty-sixth annual Red Mass in Washington, D.C., at 2 (October 4, 1998) (unpublished remarks on file with the Ave Maria Law Review).

77. *Id.* at 2.

78. *Id.* (emphasis added).

79. Pope John Paul II, *Redemptoris Missio* [On the Permanent Validity of the Church's Missionary Mandate] ¶ 3 (1990); see also POPE JOHN PAUL II, *supra* note 68, at 105-17.

the loudest for evangelization.<sup>80</sup> How can you do this? Reach out in a nice, low-key way—that is, in a truly *Catholic* way—to the many fallen-away Catholics and other people of good will that you will find in every law firm. By being a true friend to them, we can be the means by which the Holy Spirit reawakens their love for the Risen Lord and let them know that He awaits them with open arms. We can quite literally tear down the Babel-like walls that divide the human family against itself, and work for truth and justice, when we, in turn, tear down the radical separationists' wall limiting faith to the recesses of our homes.

*Second*, practice your faith. "Practice makes perfect"; this is as true of faith as it is of riding a bike. The best way we can win souls for Christ (beginning with our own) is by becoming people worth emulating, by becoming Christ-like. This means, of course, going to Mass regularly to be nourished by the Eucharist, our spiritual food as Catholics. It also means learning about our faith so that we can ably defend it, in the spirit of More's own apologetics and those of Saints Thomas Aquinas and Augustine, against the many misunderstandings and prejudices of our day.

Those of us not destined for the priesthood or religious life should be careful not to let careers or other worldly pursuits prevent us from raising good, Christian families. Such families are what the Pope has called the "domestic Church."<sup>81</sup> This terminology reflects the necessary linkage between the family, whose centrality in the divine order is confirmed by the fact that it was the vehicle through which God chose to enter human history and become flesh, and the larger Mystical Body of Christ and society as a whole. Marriage and, if possible, parenthood will enrich your lives in ways you cannot know and show you, amidst office politics and billable-hour requirements, what truly is important and enduring in life. I know it has in mine.

*Third*, hear the cry of the poor and needy. We hear much about the crisis in health care, but little about the crisis in the delivery of legal services. That is a pity. There is an alarming number of poor people who lack access to legal advice. The distressing results include people literally being thrown out into the streets due to evictions or foreclosures that could have been avoided had the persons involved, like those trying to inflict evil upon them, been represented by

---

80. POPE JOHN PAUL II, *supra* note 68, at 114.

81. See, e.g., Pope John Paul II, *Familiaris Consortio* [*The Role of the Christian Family in the Modern World*] ¶ 85 (St. Paul ed. 1997).

counsel. Criminal defendants are deprived of their liberty or even sentenced to die even though they often lack one of the most basic elements of due process: competent defense counsel to ensure that our adversarial system will be an engine for truth and justice, not a lopsided event prone to convicting (or even executing) innocent people.

With a few notable exceptions, mega law firms turn a deaf ear to the cries of the weak. Their lawyers roll in the profits of greater leverage and higher billable hours, driving their Porsches and BMWs, while this serious human need goes unaddressed.<sup>82</sup> They puff in their firm resumés about their commitment to public service, but ask yourself who is doing the pro bono when the associates have to be in the office full-time six days a week in order to meet billable hour requirements? Almost invariably it is the most inexperienced attorney, the summer associate or the first-year associate, and even then only to the extent there is no “real” work, i.e., billable work for paying clients, that they are competent to do.<sup>83</sup>

All of us should be generous with our time to serve the needs of the poor. In Washington, for example, the John Carroll Society, on whose Board of Governors I am privileged to serve, responded to James Cardinal Hickey’s call to contribute time and legal and medical know-how (and, of course, funding) to the Archdiocese of Washington’s Pro Bono Legal and Health Care Network. Participating lawyers or doctors assist some of the neediest residents of Washington and Maryland, all free of charge. Courts everywhere are also more than eager to appoint volunteer lawyers to represent indigent defendants. There are many opportunities everywhere for lawyers to use their talents and legal expertise in the service of the least fortunate; the only question is whether there are enough lawyers who care.

To be honest, many young lawyers will find that their firms will rebuff them in these efforts. I can remember being admonished by one mega firm in D.C. that “We don’t represent civil rights plaintiffs, period,” and by another across town that the Catholic Charities Ball is

---

82. Justice Stephen Breyer cites recent data showing that lawyers at the one hundred largest firms spend an average of “eight minutes per day” on pro bono, a level of commitment he acerbically describes as “just twice the time we are supposed to spend brushing our teeth.” Stephen Breyer, *The Legal Profession and Public Service*, 57 N.Y.U. ANN. SURV. AM. L. 403, 405 (2000).

83. See *Volunteerism by Lawyers Is on the Rise*, N.Y. TIMES, Feb. 19, 2003, at B1 (attributing increased pro bono to the “sluggish economy”).

“just not the kind of event we support.” If we cannot serve these two masters, the mega firm and our Church, then, like Saint Thomas More before us, we will have to choose the one over the other. Except in unusual circumstances, however, I think these three tangible (and hopefully practical) ways I have outlined for Catholic lawyers to make a difference—in other words, to “change the culture”—should be available to all of us whether we succumb to the temptation of the mega firm or take our talents into public service or the many other alternative jobs in the law that are available to bright attorneys who want to make a difference.

#### IV. CONCLUSION

In closing, let me recognize the obvious: that being a “Catholic lawyer” is a tall order indeed. It is not easy to carry out our shared vocation given the immense pressures of private practice and society’s insistence on compartmentalizing, and therefore marginalizing, authentic religious belief, especially, it seems, for the devout Roman Catholic. It is not, in other words, for the faint of heart. Saint Thomas More experienced this first-hand some four hundred years ago and nevertheless courageously performed his duty at the cost of his own life. We would be remiss if we fail to emulate his holy example during our time on earth, and I know that Ave Maria is (and will continue to be) a wonderful place for law students to learn how they can follow More’s worthy lead in our own time—in other words, how to be Catholic lawyers as opposed to lawyers who happen to be Catholic.

Despite the many obstacles in our path, we hear the words of the Holy Father, echoing those of Jesus Himself 2,000 years ago: “*Be not afraid!*” Just as the Holy Spirit gave the Apostles the inspiration and courage to go out from their cowering in the Upper Room and boldly proclaim the Good News across the globe, and just as the Holy Spirit kept Saint Thomas More steadfast in his fealty to God’s law in the face of a tyrannical king, the Spirit will likewise strengthen us to fulfill our calling as Catholic lawyers in the face of an increasingly godless society if we allow Him. If we do so, then law practice can indeed be worthy of the label “profession” someday, and we, too, will be able to say with absolute confidence at the end of our earthly pilgrimage that we, in More’s words, were the “King’s good servant, but God’s first.”