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# Must a Faithful Judge Be a Faithless Judge?

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## KEYNOTE ADDRESS

# MUST A FAITHFUL JUDGE BE A FAITHLESS JUDGE?

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Thank you for that kind introduction. It is an honor to be asked to be the keynote speaker at this conference, which includes so many distinguished thinkers as panelists and participants. It is a special pleasure for me, as well, as I have the chance to be reunited with some old and esteemed friends. I look forward to making new ones in the course of our exchanges here.

I should add that as a product and supporter of Catholic education myself—and I can assure you, having sent six of our eight children to Catholic undergraduate institutions qualifies me as a supporter—it is a source of joy and indeed pride that the University of St. Thomas has so quickly built a law school, which enjoys a fine reputation professionally, whose faculty and students are first rate, and whose halls are the home, as this conference attests, to a serious attempt to bring together faith and reason as people undertake the study of the law.

## I.

One of the highlights of each year for me in chambers is the arrival of my new law clerks. In particular, I am fond of administering the oath of office required of individuals elected or appointed to civil service, as it emphasizes so well the task that we are about together. The oath, as we all know, includes the pledge to "support and defend the Constitution of the United States against all enemies, foreign and domestic" and it concludes with the sentence "So help me God."[1] Now, one way of characterizing the point of my reflections with you today, and my answer to the title of this talk, is to say that I refuse to believe that I should have greater confidence in law clerks who utter this oath believing that the last phrase is an empty

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1. 5 U.S.C.A. § 3331 (1996).

intensifier than I have in those who actually invoke the help of the god in whom they believe.

But to hear some of the shrill cries of "theocracy" these days, and some of the illogical attacks on people who bring their religious motivations to their public work, we should indeed imagine that a person's fitness for public service varies inversely with his or her sincerity in taking that oath of office. I hope it will not spoil the surprise for you if I say that, from my perspective, being a faithful judge—that is, one who takes seriously the classic judicial task of declaring what the law is irrespective of what he or she might hope the law would be—in no way requires that one be a faithless judge.

Lest I be misunderstood, though it ought to go without saying, I should hasten to add that a part of the Constitution I am pleased to uphold is its prohibition against religious tests. I have sworn in law clerks of every faith and of no faith; I do not question the ability of those whose answers to life's profound questions differ profoundly from my own to undertake the judicial task faithfully. I might also clarify right up front that although I speak as a Catholic and a federal appellate judge, I do not speak for every Catholic, nor for every federal judge, nor for every Catholic circuit judge in what I am about to say. Nor do I wish to claim that there is not room for reasonable disagreement among Catholics, judges, and Catholic judges about the relationship between faith and jurisprudence.

In the time we have together I'd like to reflect upon the theological perspective of the Catholic tradition on the law and society, and to explain how I think that vision relates to the American legal system. One should not speak of faith and jurisprudence at the St. Thomas Law School without attending to the deep and lasting impact of Thomistic thought on what it is that we discuss here, and I shall try to suggest that the classical Catholic sources of legal thinking support the view that Catholics can be true to their faith and true to the law in our pluralistic democracy.

After spending a bit of time attending to that foundation, I'd like to turn to some contemporary questions concerning faith in the public square generally and jurisprudence and faith in particular. I will explain why I am not persuaded by the suggestion that the vision of the judge that I propose is somehow a betrayal either of the Constitution or of one's own faith.

## II.

As in so many areas of thought, one is well advised to begin one's thinking about the law with St. Thomas Aquinas's own contributions to our understanding. The patron of this law school, in his *Summa Theologica*, laid out a Treatise on Law that continues to reward our attention.[2]

2. THOMAS AQUINAS, TREATISE ON LAW (Stanley Parry, trans., Gateway Ed., 1990).

From Aquinas we inherit an organized treatment of the nature of laws, including a taxonomy of laws relating four types of law: first, of course, eternal law, the highest order of law pertaining to all reality—from the laws of physics to the moral law.[3] Human comprehension of eternal law progresses in accord with the progress of our knowledge in general, and is as limited as our knowledge in general. Natural law, on the other hand, is particular to humanity, consisting in rational principles of action knowable to reason. Human laws, which are derivative in ways more or less direct from eternal and natural law, are necessary both because human beings sometimes need the threat of punishment to follow through on the dictates of practical reason, but also and importantly because even a society of saints would need, say, traffic laws and rules of inheritance to order their affairs. Finally, because human beings are born into what he calls the "twofold darkness of sin and ignorance,"[4] and therefore can have trouble discerning with clarity even what the natural law requires, we have divine law, revealed to aid us in reaching our ultimate goal.

With these four categories in mind, we can see that within the Catholic tradition, law is not just a single box into which all things legal are thrown. It is worth noting, for our purposes, that the natural law, while central to Aquinas, is not the last word on law. The natural law does not define for us the job of a judge; it does not require that there be a Supreme Court or a court of appeals any more than it mandates the Securities and Exchange Commission or an NFL Commissioner. So the human law, of which the job of an appellate judge in our system is a creation, is necessary to understanding the role of the judge, as well as the limitations of that role.

And while it is certainly true that Aquinas was writing for a time and a place rather different from our own, just as striking as the differences between his era and ours is the ongoing relevance of the model of legal thought he advances in the *Summa*. As I noted, St. Thomas found a need for human law not only in our need for motivation, but in the very nature of society itself. Indeed, as Aquinas puts it, following Augustine: "it is of the essence of a nation that the mutual relations of the citizens be ordered by just laws."[5] Professor Robby George of Princeton rightly considers this passage to indicate that the rule of law is at the heart of Thomas's understanding of law and of society.

Without a doubt, the rule of law also shapes Thomas's understanding of the role of the judge. Later in the *Summa*, after the Treatise on Law and in his discussion of the virtues, Thomas engages in a thirteenth-century version of our contemporary debates over textualism and purposivism. His

3. *Id.* at 11–26.

4. From St. Thomas's "Prayer Before Study": "Pour forth a ray of Your brightness into the darkened places of my mind; disperse from my soul the twofold darkness into which I was born: sin and ignorance. . ." *available at* http://www.bostongrad.org/aquinas.htm.

5. *Supra* note 2.

treatment, in his customary style of objections and replies, is not all that different from the mini-course in statutory interpretation that I have the pleasure of teaching each summer at NYU with Professor Bill Eskridge, come to think of it. At least, I can do no better in coming up with a bottom line than Aquinas's own statement of the role of the judge in light of a written text: "In these earthly laws," he says, "though lawmakers judge about them when they are making them, when once they are established and passed, the judges may judge no longer of them, but according to them."[6]

In my chambers hangs a print of the well-known Hans Holbein portrait (present here in this hall as well) of another great St. Thomas, the very patron of lawyers, St. Thomas More. As his biographer R.W. Chambers relates, Lord Chancellor More once illustrated his devotion to the rule of law by declaring that, "were it my father stood on the one side, and the devil on the other, his cause being good, the devil should have right."[7] Clearly for More the judge, the devil's cause being right meant only his cause having the law on its side. Moral duty for this great saint of our Catholic tradition required him to separate, in his duties as judge, his knowledge of the law from his knowledge of morality.

As Judge Robert Bork once noted, the playwright Robert Bolt got More "remarkably right" in this regard.[8] Judge Bork was recalling Bolt's portrayal of More explaining to his daughter, Margaret, why he would not arrest his betrayer Richard Rich. Margaret and her husband William Roper pointed out that while Rich may not have broken any of England's laws, he had broken God's law. Bolt's More in reply avers:

> Then God can arrest him. . . . The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. I'm *not* God. The currents and eddies of what's right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester.[9]

I won't claim to be quite the forester that Judge More surely was, although I will note that however tangled the thicket of English law may have been, he did not have to contend with the undergrowth of the Ninth Circuit's precedents! In any event, suffice it to say that I can do no better to uphold his ideal than to remind myself when I glance at his portrait that, despite the considerable authority entrusted to me as a United States Circuit Judge, I'm not God either.

I hope you will forgive me for spending so much time on my Catholic forebears in laying out my thoughts on faith and jurisprudence. But I want

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6. THOMAS AQUINAS, SUMMA THEOLOGICA, Part II of the Second Part, q. 60 a. 5, *available at* http://www.newadvent.org/summa/306005.htm.

7. *Quoted in* Robert Bork, *Thomas More for Our Season*, FIRST THINGS, June/July 1999, *available at* http://www.firstthings.com/ftissues/ft9906/articles/bork.html.

8. *Id.*

9. *Id.*

to make clear that those of us who subscribe to what has come to be called "conservative" jurisprudence did not invent this approach to law out of whole cloth in response to contemporary "liberal" jurisprudence. The roots of a role for judges more akin to the "umpire" in Chief Justice Roberts's now familiar analogy than to the moral philosopher, Hercules, who is the hero of Professor Dworkin's theorizing, are deep in the history and thought of the legal and intellectual tradition that I consider home.[10] And I should note that my intellectual home is not exclusively within the Catholic tradition. For though I am a proud graduate of St. John's University—the great school in Queens, as opposed to the great school in Collegeville—I can also say that what I learned at Harvard Law School in the early 1960s was closer to Aquinas and Augustine than what I fear one might be learning there today.

## III.

It is important in this context to affirm my belief that a modest role for judges, a rejection of the idea that judges possess the very mind of God, is at the heart of my faith tradition's understanding of the law. So in a sense, though this is perhaps not the time to say so, I'm not a great choice to be the keynote speaker of a conference such as this. Because as I understand what my faith tradition teaches me about jurisprudence, it amounts to the most unexciting and non-threatening jurisprudence one can imagine: one committed to the rule of law. The notion of the rule of law, rather than of judges, is nonthreatening in just the way that Alexander Hamilton suggested it ought to be when he called the judiciary the "least dangerous" branch in *Federalist* 78.[11] If we have the rule of law, rather than of judges, then the faith of the judge should not matter much.

Such a vision is not only nonthreatening—it is reassuring. For just as Aquinas held the rule of law to be of the essence of society, I would note that a modest vision of the judiciary's role is crucial to the securing of liberty. The very notion of ordered liberty assumes that the rule of law is part and parcel of securing the blessings of freedom. Sadly, our current experience of trying to build democracy in Iraq gives us a daily reminder of the ways in which the breakdown of law threatens liberty and indeed life itself. Two crucial elements of the ordering of liberty in our system are relevant to our topic today: the separation of powers and the separation of church and state.

I mentioned earlier that in addition to being nonthreatening, the vision of faith and jurisprudence that I have to offer is not all that exciting. By this

10. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the U.S., Comm. on the Judiciary*, 109th Cong. 55–57 (2005) (statement of John Roberts, nominee to be Chief Justice, Supreme Court); RONALD DWORKIN, LAW'S EMPIRE 239–40 (Belknap Press 1986).

11. THE FEDERALIST NO. 78 (Alexander Hamilton).

I mean to dispel the seemingly increasingly prevalent fear that the faithfulness of so many in our democracy is among the greatest of current threats to our democracy. A selection of recent book titles should suffice to demonstrate what I have in mind: *The Baptizing of America: The Religious Right's Plans for the Rest of Us*; *American Theocracy: The Peril and Politics of Radical Religion, Oil, and Borrowed Money in the 21st Century*; and *The Theocons: Secular America Under Siege*.[12] Now, what these titles have in common is that they are undeniably exciting. To read them is to learn that theocracy is upon us, that religious conservatives are plotting to change things for the rest of us, and that parts of the nation are apparently under siege.

I think it is apparent from my own remarks that at least as far as I understand my own faith tradition it does not require, and indeed it would not permit, my participating in any such siege. I believe there are a variety of erroneous assumptions at work in these warnings about a growing theocratic movement, but today I limit myself to noting that nobody should be threatened by the fact that many judges are people of faith.

## IV.

I said at the outset that I do not pretend here today to speak for all Catholics or all judges. Indeed, just three years ago at this law school, one of my Ninth Circuit colleagues, Judge Stephen Reinhardt, suggested that the kind of vision that I have laid out here divorces "justice from the workaday vision of the judiciary,"[13] and praised our Catholic colleague and dear friend Judge John Noonan for bringing a "passion for social justice for ordinary people" to his work on the bench.[14] I do not quarrel with Judge Reinhardt for praising Judge Noonan, who is without question a giant of the legal profession as well as one of the major figures in American Catholic thought in the last half century.

But I would take a few moments respectfully to disagree with the vision of jurisprudence that Judge Reinhardt laid out in his remarks here. He described the task of the judge in relation to a very abstract notion of the law as "a means to an end . . . to ensure freedom and liberty and to help provide a decent life for all Americans."[15] Now that is all well and good, except of course that it does not answer the question we are truly interested in—what is the judge's role in pursuing that end—except perhaps in a question-begging way.

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12. *See generally* Ross Douthat, *Theocracy, Theocracy, Theocracy*, FIRST THINGS, Aug./Sept. 2006, *available at* http://www.firstthings.com/ftissues/ft0607/articles/douthat.html.

13. Stephen Reinhardt, *The Role of Social Justice in Judging Cases*, 1 U. St. Thomas L.J. 18, 19 (2003).

14. *Id.* at 18.

15. *Id.* at 18–19.

I have suggested that the primary role of the judge in our system is to uphold the rule of law, even when the law he or she must uphold does not seem wise or even just. Judge Reinhardt's speech acknowledged that the separation of powers was "undoubtedly an important feature of our republic" but then tried to minimize its importance in securing the justice our Constitution aims at establishing.[16] Far more prominent in his remarks was the "Constitution's capacity for evolution," a process apparently guided not by democratic action but judicial fiat.[17] This was exemplified, Judge Reinhardt reminded us, by the Warren-Brennan Court, which refused to "wait on the sidelines" while the other institutions of government lagged behind.[18] Apparently my Article III commission means I evolve faster than the rest of you!

Let's think about those two aspects of Judge Reinhardt's jurisprudence: the evolving Constitution and the judiciary's impatience with what we sometimes call the political branches. It acknowledges that some of Judge Reinhardt's readings of the Constitution depart from the understanding of its authors—or else it has not evolved. And it acknowledges that some of those readings are not the views voted upon by our fellow citizens. Now, let me assure you—Judge Reinhardt is definitely a brilliant man and one who strives to uphold his vision of justice, good qualities both. And doubtless, there are moral views that he has and I would share that we think superior to those of the original Constitution, and perhaps even superior to those of our fellow citizens. What I have trouble seeing is what entitles Judge Reinhardt or Judge O'Scannlain to declare his own sincerely held views to be law when neither his predecessors nor his contemporaries have enacted them.

Finally, Judge Reinhardt suggested that a "more expansive view of the judicial function will often reach an outcome . . . more sympathetic to . . . the person in need."[19] He illustrated his point by reference to a case in which he accused his colleagues of "compassionless conservatism."[20]

With all due respect to my eminent colleague, his description of the judge's role suffers from two basic analytical mistakes. As I hope I have shown, our system does not view the separation of powers as somehow opposing justice; it is, rather, essential to it, in virtue of its contribution to the rule of law. Suggesting that the separation of powers is somehow in conflict with the Constitution's pursuit of justice is the first mistake. The second is the idea that the judge ought to pit compassion against the rule of law. The idea of compassion only makes sense against a background of

16. *Id.* at 20.
17. *Id.* at 21.
18. *Id.* at 22.
19. *Id.* at 25.
20. *See* Gradilla v. Ruskin Mfg., 320 F.3d 951, 960 (9th Cir. 2003) (Reinhardt, J., dissenting).

justice. This is clear theologically in the Christian tradition: God's mercy toward sinners does not obliterate the category of sin. It is the sin of presumption to imagine that because God is merciful I can abrogate his commands. Similarly, while there is allowance in our system for the exercise of discretion, it does not fall to the judge to second guess the lawgiver in order to bring about the judge's vision of justice or to exercise the judge's understanding of compassion, except where such discretion has been expressly delegated.

Nobody would suggest, I hope, that a police officer should suppress evidence of a crime committed by an immigrant because he regards our removal laws as draconian. Similarly, while a prosecutor has the discretion not to bring a case to trial, if a judge thinks that discretion ought to have been exercised in a given case before her, she is not free therefore to exercise partiality in favor of the defendant in adjudicating the case. No more am I free, as an appellate judge, to import my substantive views about how the law ought to be in the name of sympathy or compassion.

Moreover, I see no justification in our system of law for the presumption that my views are superior to those of the legislature. Certainly I often believe they are, but the way for me to act upon that belief is to vote for candidates who represent my views. It is not permitted to me to search for or to invent "ambiguities" in the law in order to correct what I perceive to be its deficiencies. Make no mistake about it, like every judge, I am capable of misinterpreting the texts before me. But I am well persuaded that compassion, about which I am also occasionally mistaken, does not require me to "expand" my role in the legal system.

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

In his first encyclical, *Deus Caritas Est*, Pope Benedict XVI wrote of the Church that "[s]he has to play her part through rational argument and she has to reawaken the spiritual energy without which justice, which always demands sacrifice, cannot prevail and prosper," but he continued that "[a] just society must be the achievement of politics, not of the Church."[21]

21. *Available at* http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html.

In our political system, substantive improvements to the social order are brought about by legislators, not federal appellate judges. The fact that the Constitution is ordered toward justice, as Judge Reinhardt noted, does not mean that the federal judiciary has a blanket commission to "do good and avoid evil" as our own consciences would dictate. As Professor Henry Monaghan once wisely reminded us, ours is not a perfect Constitution, and taking the oath to uphold it is not taking an oath to impose one's vision of perfection from the bench.[22] Nor is mine a perfect conscience, I might add. And so I will continue to suggest that we federal judges limit ourselves to legal arguments when deciding cases, where there will be room enough for disagreement.

## V.

In conclusion, I hope to have shown today how a traditional understanding of the law within Catholic thought can shape a jurisprudence that is consistent with our American political system and the role of the judge within it. I have also tried to show that other conceptions of jurisprudence, whether related to any faith or no faith, are a greater threat to the design of that system than the fact that many judges are also people of faith. And I trust that along the way I may have said something to provoke a question or two, which I'm happy to take some time to answer now. Thank you.

22. *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981).