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ARTICLE

GOOD CASUISTRY AND BAD CASUISTRY: RESOLVING THE DILEMMAS FACED BY CATHOLIC JUDGES

BRIAN Z. TAMANAHA

I. INTRODUCTION: DISTINGUISHING GOOD AND BAD CASUISTRY

Casuistry is an intriguing word with two connected meanings that are opposite in their thrusts. The older, positive meaning is this: "the application of general ethical principles to particular cases of conscience or conduct."[1] Casuistry in this sense is associated with moral and legal reasoning in the Catholic tradition through the Middle Ages. The newer, pejorative meaning of casuistry is this: "specious, deceptive, or oversubtle reasoning, especially in questions of morality."[2] This meaning took hold after the Reformation, in the wake of Protestant criticisms that Catholic casuistic reasoning mainly served to justify bad conduct.[3] For simplicity, I will call these "good" and "bad" casuistry, respectively.

Both senses of casuistry refer to moral and legal reasoning in connection with concrete situations, but good casuistry lauds this form of reasoning, while bad casuistry is skeptical of it. Although casuistry—in both senses—is identified with Catholicism for historical reasons, it is not limited to that particular religious tradition, but rather describes any approach to reasoning about moral principles which emphasizes resolving dilemmas in specific contexts of application. Owing to two problems set out immediately below, good casuistry in a religious context must always guard against degenerating into bad casuistry.

The first problem is that novel and unanticipated situations are constantly thrown up as society evolves in every way: political, cultural, economic, technological, legal and so forth. Consequently, longstanding religious teachings and principles, developed in an earlier day, must on an

1. Dictionary.com, http://dictionary.reference.com/search?r=2&q=casuistry (last visited Feb. 19, 2007).

2. *Id.*

3. Wikipedia: The Free Encyclopedia, http://en.wikipedia.org/wiki/Casuistry (last visited Feb. 19, 2007).

ongoing basis be interpreted and extended to apply to circumstances that were unimagined when the principles were first laid down, all the while maintaining the appearance of consistency. As we know from hotly disputed contemporary disagreements about the meaning and application of provisions in the U.S. Constitution, applying two-century-old principles and rules to modern situations leaves many open questions, and much room to maneuver. The difficulties are magnified when the principles being applied were laid down two thousand years ago. Under these circumstances, reasoning from teachings and principles requires imagination and subtlety. For anyone who aims to be true to the controlling teachings and principles, moreover, self-discipline is an essential trait because more than one outcome frequently can be rationalized.

The second problem is that people must live and undertake activities in, and earn their keep in, a society of intercourse that is often indifferent to religious teachings. Life is complicated. Church teachings and moral principles tend to operate at a level above the messy reality, requiring conformity to demanding dictates about good and bad behavior. When these moral dictates appear to require an unpalatable sacrifice, like giving up a lucrative or powerful trade, there will be a strong incentive to attempt to reconcile the contrary church teachings and moral principles with the prohibited activities. When such reconciliation is not easy to accomplish, the reasoning that justifies continued participation in the offending activity will involve increasingly subtle distinctions and arguments. Taken to an extreme, this effort may even come to justify conduct that at first blush would appear to be directly at odds with the underlying teaching or church principle.

These two problems interact: the openness entailed by the first increases the ease with which the temptation entailed in the second can be satisfied. As a consequence, there is constant pressure on good casuistic reasoning to produce what has the appearance of bad casuistry. One and the same body of moral reasoning can be viewed as good casuistry or bad casuistry depending upon the perspective from which it is being adjudged. The people engaged in the reasoning may well be persuaded that it is right and convincing. When this selfsame reasoning is evaluated by persons not steeped in the assumptions or mindset of the reasoner, however, it can look specious and deceptive. Ironically, the former would proudly identify his or her finished work as a fine example of casuistry, while the latter would see it as evidence that casuistry involves exercises in rationalization that allow people to carry on the activities they desire without violating religious teachings or moral principles.

A couple of mundane personal examples will help make this point and its implications more concrete. My neighborhood in Queens, New York City, has many Orthodox Jews. I am friendly with my neighbors, and have been called upon by them on several occasions on Sabbath to help with a problem. I am considered a neighborhood goy, and am proud of this role.

On one occasion, my neighbor asked me to come over to turn on her stove. She had an automatic timer that usually did the trick, but that day it was broken, and she needed to cook. She told me that she could use the stove and turn it off, but she was prohibited from turning it on. On another occasion, I was asked to come into the temple to turn on the air conditioner (for the same reason). And on a number of occasions, I have been asked to push elevator buttons for Jews who wished to ride.

I have no doubt that there are elaborate rationalizations that justify these activities, supported by a sophisticated body of religious commentary. And I respect the views of my Orthodox neighbors, which are no doubt sincere.

To be frank, however, I'm skeptical. It strikes me as a subtle rationalization to allow someone to use and turn off an air conditioner or stove, or ride an elevator, so long as he does not personally turn it on. From my outsider perspective, I assume that whatever traditional prescriptions they are following were set down before the invention of electric stoves, air conditioners, and elevators. And I assume that they do not want to give up these modern conveniences—as I would not—and therefore have worked out ways to reconcile the uses of these devices with ancient religious teachings.

These cursory observations will likely have plausibility with people outside the Orthodox tradition—and that is what I wanted to illustrate by invoking them. Just as I am not an Orthodox Jew, I am not a Catholic. Now let me turn to the Catholic context, and specifically to Professor Hartnett's paper. Professor Hartnett engages in careful and subtle reasoning about the ways judges should reason through moral dilemmas, but at times his analysis strikes me in the same way as the activities of my Orthodox neighbors. Consider a couple of examples of casuistic reasoning he mentions. Although the use of contraceptives is a sin according to Church teaching, one of the moral manuals he refers to says this: "Clerks in a drug store may never advise customers in the purchase of contraceptives, but to keep these positions they may sell these things to those who ask for them."[4] Here is a related example: One may sell an item that can only be used in sin, so long as the seller disassociates his intention with that of the sinner, and "the purchaser can easily get the article elsewhere."[5] And a final example: Although immoral dances and shows promote sin, the owner of the theatre, the staff, and the musicians can all work in connection with the shows, basically because these are income-generating positions and people need to make a living.[6]

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4. Edward A. Hartnett, *Catholic Judges and Cooperation in Sin*, 4 U. ST. THOMAS L.J. 2, 221 (2007).

5. *Id.* at 253 (citing 1 HENRY DAVIS, MORAL AND PASTORAL THEOLOGY 346 (L.W. Geddes ed., 8th ed. 1959) (1935)).

6. *Id.* at 252.

In each of these examples, the activity is sinful according to Church teaching and the person involved is in one way or another facilitating that activity. The activities involve everyday activities. They have an economic component. And giving up that activity will inflict a financial sacrifice. Casuistic reasoning allows participation in these sinful activities without violating church teachings and moral principles.

Professor Hartnett can rightly protest that I have taken these positions out of context, and insist that they make sense when viewed in terms of the moral reasoning applied. Yes, and I also took the practices of my Orthodox neighbors out of context. But that is my point. Although I can follow the reasoning, from the standpoint of an outsider these look like rationalizations of activities to allow people to carry on in the modern world. What members of the Church might consider good casuistry smacks of bad casuistry to others.

These introductory comments about good and bad casuistry do not directly bear on or respond to Professor Hartnett's argument, which must be engaged on its merits. Rather, they suggest that there are prudential reasons to critically scrutinize casuistic reasoning to insure that it is not rationalization in the guise of moral reasoning. The above examples involve relatively benign situations. But the same cannot be said when casuistic reasoning is invoked in legal contexts. The next Part will discuss, again in general terms, legal examples of casuistic reasoning in connection with the death penalty and divorce. The Part thereafter will specifically take up Professor Hartnett's argument on abortion bypass cases. Throughout this analysis I will challenge Professor Hartnett's argument from the standpoint of an outsider who is concerned about the implications of his casuistic reasoning for other affected parties and for the legal system.

II. Casuistry in the Legal Context

The legal system is a system of coercive public power. Literally, it inflicts pain, death, and restraint on human bodies; it can take money and possessions, as well as freedom; it grants and allocates powers and resources, and requires conformity with its dictates. The judge occupies a pivotal position in this organized, coercive system. For this reason, when evaluating the implications of Catholic teachings and moral principles for judges, one cannot remain only within the internal Catholic perspective.

To appreciate the stakes involved, consider an argument referred to by Professor Hartnett in connection with the death penalty. The death penalty was allowed in early Church teaching. When writing on the subject, Saint Thomas Aquinas held that a judge who knows that a person has been convicted by a false witness may nevertheless sentence that innocent person to

death, as long as the evidence supports the sentence.[7] Aquinas offers this rationale for his position: the judge is merely applying the law, and the real sinner in this situation is the false witness. But what about a moral principle that lines up on the other side: knowingly ordering the death of an innocent person is wrong. Any reasoning that detracts from this fundamental proposition must be compelling.

Aquinas' example is expanded upon by Father Slater, who asserts that it is not sinful for a judge to administer an unjust law. Here is Father Slater's reasoning: "A judge, who is merely the mouthpiece of the legislator and administers law ready made, may often co-operate in administering unjust law, for otherwise he would have to resign his office."[8]

There are two points I wish to make about these arguments. First, Aquinas' and Father Slater's argument accomplishes too much, and by implication reveals a troubling looseness in casuistic reasoning. If the reason a judge does not engage in sin when knowingly sentencing an innocent person to death or when applying an unjust law is that the judge is merely passively doing what the law requires, as both Aquinas and Father Slater suggest, then this reasoning would suffice in all cases to absolve the judge of moral responsibility for legal actions. If that is correct, there would be nothing further to discuss about this subject. The judge faces no moral dilemma—is always innocent of sin—in connection with any action that is compelled by the law. By using the conditional term "may often," Father Slater suggests that this argument won't always work to absolve a judge, but then we need to know when and why it will be insufficient, and we must keep in mind that Aquinas' example is a rather extreme one of injustice.

The situation is complicated further because the above statements are at odds with a more famous position identified with Aquinas—the notion that unjust laws lack authority: "And laws of this sort . . . are acts of violence rather than laws, as Augustine says, 'A law that is not just seems to be no law at all.'"[9] If unjust laws are "a perversion of law," as Aquinas says, it is unclear how or why a judge can be absolved of sins when acting pursuant to such laws, which, lacking legal status, are not morally obligatory. My point is not to participate in this complicated debate, but rather to reveal the contestable and flexible style of casuistic reasoning, through which context specific rationalizations may lead to results that appear at odds with starting general principles.

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7. *Id.* at 243 n.94 (citing THOMAS AQUINAS, SUMMA THEOLOGICA, *Part II of the Second Part*, q. 64 n.6 (in Vol. 3 of Fathers of the English Dominican Province trans., Christian Classes 1998)).

8. *Id.* at 246 (citing 1 DAVIS, *supra* note 5, at 349).

9. THOMAS AQUINAS, SUMMA THEOLOGIAE, *Part I of the Second Part*, q. 96 a. 2 (*in* vol. of Hutchins ed., & trans., Fathers of the English Dominican Province 1952).

Second, a particular aspect of Father Slater's justification bears emphasis. He includes in his evaluation of the judge's conduct recognition of the fact that "otherwise he would have to resign his office." This adverse consequence suffered by the judge apparently counts as a factor in determining the morality of the action, although it is not clear how much weight it is given. If this weighs heavily—after all, enforcing an unjust law would appear to be a quite weighty consideration—then it appears that judges can often engage in official actions that would be considered wrongful from the standpoint of Church teaching or moral principles.

There is another serious problem with this way of reasoning. A strong argument can be made that moral principles matter most when a person must give up something to conform to the principle. If one has no compulsion to be a child molester, then the moral impropriety of this act is irrelevant to one's behavior. Only people inclined toward pedophilia demonstrate their fealty to the moral prohibition of it when they abstain from acting on their compulsion. If the very fact that one must pay a price is a factor weighed in the evaluation of the propriety of the activity, as Father Slater's words suggest, then this aspect of morality is diminished. As I noted earlier, (bad) casuistry characteristically takes personal sacrifices of this kind into consideration when determining whether the activity will be allowed, which raises a legitimate suspicion about whether the primary goal driving the reasoning is to figure out the morally correct course of action or to find some rationalization that will allow it to continue.

A few quick observations about divorce, also mentioned in Professor Hartnett's paper, will reinforce the points just made. Setting aside various nuances, divorce is a sin in Catholic teaching. But divorce is common in modern Western societies. Divorces are granted by a judge, and many judges handle divorce cases. If Catholics cannot participate in divorces, it would follow that Catholics will be precluded from holding judicial positions in many jurisdictions. Not surprisingly, the Church appears to take a pragmatic stance with respect to these cases, allowing judges to grant divorces for "grave and proportionate reasons."[10]

This treatment of divorce appears to be at odds with Professor Hartnett's analysis about the distinction between formal and material cooperation in sin, a distinction which is central to his analysis.[11] Stated in the simplest terms, formal cooperation in sin involves participating in a sin with the intention to bring about its purpose, whereas material cooperation in sin involves participating in the sin but without intending it. Generally speaking, one may not formally cooperate in sin, but material cooperation is per-

10. Hartnett, *supra* note 4, at 247 (citing Pope John Paul II, Address to the Roman Rota (Jan. 28, 2002)).

11. *Id.* at 230–33.

missible under certain circumstances (primarily, when the good that follows outweighs the evil of the sin).

Owing to the outcome determinative consequences attached to this distinction, the categorization of an act as "formal" or "material" cooperation is pivotal. Professor Hartnett, for example, laboriously argues that a judge who imposes a death penalty might nonetheless not intend that the penalty be imposed (for example, when proceeding to ask that clemency be granted to the condemned). Again note how casuistic reasoning can arrive at a counter intuitive result—that a judge who *orders* a death penalty does not *intend* it. In the absence of a plausible argument of this sort, judges who impose the death penalty will be formally cooperating in sin. It would follow that Catholic judges will not be able to preside over these cases (assuming the death penalty is prohibited under Catholic teaching, which is a disputed issue). This is arguably not a major problem because death penalty cases are relatively infrequent, but the same cannot be said of divorce.

What makes divorce interesting is that it seems *impossible* to argue that a judge who grants a divorce order *does not intend it*. Imposing a death penalty does not in itself achieve the death, which is carried out by others, usually at a later date, and following many potentially intervening circumstances. An order granting a divorce, by contrast, is what is known as a performative act—the very granting of the order accomplishes its objective. By signing the divorce order, the judge literally ends the marriage; indeed, it usually cannot be terminated without a judge's signature. Thus, according to the criteria provided by Professor Hartnett, it would seem to necessarily follow that judges who grant divorces are formally cooperating in sin. Nonetheless, the Church's position appears to treat these situations as if judges are merely involved in material cooperation. My point is not to debate the appropriate way to categorize divorce, but rather to point out, once again, the apparent flexibility of casuistic reasoning in situations that involve a high cost for conformity.

III. Hartnett's Argument on Abortion Bypass Cases

The foregoing arguments raise general concerns about casuistic reasoning. I will now specifically address Professor Hartnett's argument relating to judges who preside over cases in parental bypass situations. Ordinarily, minors must obtain parental consent to have an abortion. As Professor Hartnett describes,[12] minors may petition a judge to allow them to obtain an abortion without such consent.

Hartnett distinguishes and categorizes two types of decisions a judge is called upon to make pursuant to statutory bypass provisions.[13] One decision is whether the minor is mature enough to decide for herself; the second

12. *Id.* at 249.
13. *Id.* at 249–51.

decision, which takes place when the judge determines that the minor is not mature enough, is whether an abortion is in the best interest of the minor. When a judge decides that the minor is mature enough to make the decision without parental consent, Hartnett classifies the judge's cooperation as "material." It is material because a judge who makes such a decision does not necessarily intend the abortion. Although the judge is aware that an abortion will likely follow from the decision, the judge is merely granting that the minor is mature enough to make her own decision. In contrast, when a judge determines that the minor is not mature enough, and must therefore decide whether the abortion is in the minor's best interest, the cooperation in any affirmative decisions is "formal." It is formal because a judge who rules in the affirmative on this question will intend the abortion. Notwithstanding these different categorizations, in both types of cases Professor Hartnett concludes that the judge must recuse herself. One can never engage in formal cooperation with sin, and one can engage in material cooperation only when the good that follows (under the notion of double effect) outweighs the evil, which he says is not the case in these situations.

I will not question Professor Hartnett's respective categorizations. Nor will I question his analysis that Catholic judges should not participate in either of these situations. Instead I will focus on his analysis of the judge's proper course of action given those conclusions.[14] There are two options: resignation or recusal. Professor Hartnett argues that recusal is the appropriate course. He reasons that these cases are relatively infrequent, so judges who recuse themselves will still be able to work effectively in their positions. Recusal is called for under judicial ethics rules when a judge cannot be impartial. Professor Hartnett suggests that Catholic judges opposed to abortion fall into this category (although he recognizes that recusal arguably does not apply to situations in which judges have moral qualms about the law). His bottom line is this: "From the perspective of moral theology, it would seem that resignation would only be called for if the cases were so frequent as to cause cumulative harm to the judge, such as hardening the heart."[15]

Professor Hartnett's argument, I believe, exemplifies the dangers of casuistic reasoning. Note that it focuses primarily on the consequences to the Catholic judge—the risk to the judge of suffering personal harm. That is the standard orientation of casuistic reasoning, which analyzes the appropriate course of conduct for an individual in morally fraught situations. As a consequence of this primary focus, other possible moral implications can be shunted to the background. In his analysis, Professor Hartnett pays little attention to the consequences of the judge's recusal decision to other judges, to the minor, and for the law. A broader moral focus would pay full

14. *Id.* at 257–58.
15. *Id.* at 258.

attention to these other direct and collateral consequences of the decision, as I will briefly do below.

When a judge recuses herself, a fellow judge must take up the case. No judge *wants* to handle these agonizing bypass cases. Many judges have moral qualms about abortions. When a bypass request is granted under either alternative, the judge plays a determinative role in bringing about an abortion. Every judge understands that a pregnant minor has no good options and a difficult future. Tragedy will follow no matter which way the judge rules. Moreover, in most states, judges face some kind of election, and every judge knows that anti-abortion activists target judges on the issue of abortion. Judges who handle many of these cases thus put their positions at risk.

To put the consequences in frank (and uncharitable) terms, a judge who recuses herself from these cases pushes off the sin and agony they bring onto other judges, and places their jobs in jeopardy. Catholic judges who follow Professor Hartnett's analysis will keep their hands clean, consciences clear, and jobs secure, all at the expense of other judges. Now let's consider the other option: resignation. If a Catholic judge resigns, her position can be filled by a judge who will not recuse herself. The sin and agony of these cases will be evenly distributed among all the judges; no particular judge can be inordinately targeted by anti-abortion activists because all participate equally.

What about the adverse consequences of recusal to minors and to the legal system? The course of action Professor Hartnett promotes is already taking place. An examination of these situations sheds light on the implications of his approach. In one local court in Tennessee, five out of nine judges refuse to sit on bypass cases, leaving the remaining four judges to hear all of them.[16] Judges in Alabama and Pennsylvania have also begun to recuse themselves. If more and more judges do this, as a practical matter it will become difficult for minors to exercise their legal right to obtain an abortion. If no judge in their area will hear the case, the minor may have to travel long distances to find a willing judge, but travel is especially difficult for minors (and given the situation, parents cannot be called upon to help). A desperate minor may even feel compelled to seek an underground abortion, with obvious attendant dangers. In addition to exposing minors to harm and defeating their legal rights, mass recusals by judges undermine the integrity of the legal system by systematically restricting the application of a valid law. None of these consequences would follow if judges whose moral principles preclude them from participating in these types of cases resign and allow their positions to be filled by judges who are not so precluded.

16. Adam Liptak, *On Moral Grounds, Some Judges Are Opting out of Abortion Cases*, N.Y. TIMES, Sept. 4, 2005, at 1.21.

Anti-abortion advocates might well be pleased by mass recusals, which will likely reduce the number of abortions by minors. I will not argue against that here. Returning to Professor Hartnett's argument, my point is that imposing serious burdens on other judges, defeating the legal rights of minors and increasing the risks they face, and undermining a valid law, all raise serious moral considerations in their own right, which were not included in his casuistic analysis of what Catholic judges should do in these cases. His focus was almost entirely on the moral implications for and harm to the individual Catholic judge. Beneath the surface, yet weighing in the balance, was the fact that resignation imposes a serious personal cost on Catholic judges, and would preclude Catholics from becoming judges in courts that handle these cases. If the overarching motivation is to discern the proper moral course of action in a difficult situation, then *all* of the moral implications surrounding the situation, including implications for others and for the legal system, must be fully considered in the evaluation. Otherwise the analysis will smack more of bad casuistry than good casuistry.

IV. Conclusion

The forgoing analysis comes down too hard on Professor Hartnett, and on judges who decide to recuse themselves under these circumstances. The situation he addresses is exceedingly complex, and he approaches it with genuine integrity and an understanding of the dilemmas faced by the judges. There is no easy or clear answer to what they should do. If I have been overly harsh, it is not directed toward Professor Hartnett, but rather reflects my suspicions about casuistic analysis, the reasons for which I have elaborated. I will end with a few words about what I think is a good way to approach moral dilemmas.

We face moral dilemmas all the time. Often we experience a *dilemma* not because the course charted by the applicable moral principles is unclear, but because for one reason or another we would prefer not to follow that course. The desire to do other than what the moral principle dictates is what creates the dilemma. It is natural under these circumstances to struggle to find some way to get around the moral principle, by finding an exception, striving to distinguish the situation, or reasoning to rationalize away the conflict. What drives this analysis is that we want to do what we want to do and yet feel that it's okay—that we are not behaving improperly when we go ahead. I speak from experience.

There is another way to proceed when confronted with a moral dilemma. We can accept that there is a real conflict between what we want to do and what the moral principle requires. At that point we must choose. Painful and difficult as it is, we can forego the desired action, and accept that as the price to be paid for remaining true to the moral principle. Or, we

can engage in the desired action, and, painful and difficult as it is, recognize that we have done something morally wrong.

Compare the difference in these two ways of dealing with a moral dilemma: engaging in an effort to rationalize versus facing up to the conflict and choosing. When one accepts that there is a conflict, whether one decides to honor the principle or to engage in the activity, the person experiences the painful and difficult consequences of the choice. When one attempts to rationalize, the primary difficulty is in struggling to come up with a convincing way to rationalize the desired activity with the apparently conflicting moral principle; once that is accomplished, the initial dilemma dissolves and the person proceeds to engage in the activity with a clear (or at least assuaged) conscience. Most people, under different circumstances and at different times, have utilized both of these ways of dealing with moral dilemmas. That does not, however, mean they are equally laudable. It seems evident, though I will not offer an argument to support it, that facing the conflict and making a choice has more to commend it from a moral standpoint than engaging in an effort to rationalize.

The broader point of my argument in this essay is that Catholic judges faced with moral dilemmas, whether in death penalty cases or abortion cases or any other morally difficult situation, might be better served by accepting the conflict and making a choice rather than struggling to find a way to dissolve it.