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## Private Conscience, Public Duties: The Unavoidable Conflicts Facing a Catholic Justice

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ARTICLE

**PRIVATE CONSCIENCE, PUBLIC DUTIES:  
THE UNAVOIDABLE CONFLICTS FACING  
A CATHOLIC JUSTICE**

SCOTT C. IDLEMAN\*

*I think that when statesmen forsake their own private conscience for the sake of their public duties . . . they lead their country by a short route to chaos.*<sup>1</sup>

Most everyone is familiar with John F. Kennedy's remarks, when running for President in 1960, regarding the attenuated relationship between his governmental and religious obligations.<sup>2</sup>

Whatever issue [said Kennedy] may come before me as President, if I should be elected—on birth control, divorce, censorship, gambling, or any other subject—I will make my decision in accordance with . . . what my conscience tells me to be in the national interest, and without regard to outside religious pressure or dictate. And no power or threat of punishment could cause me to decide otherwise.<sup>3</sup>

Many are likewise familiar with former New York Governor Mario Cuomo's similar detachment of his governmental role and responsibilities from his potential duties as a faithful Catholic.<sup>4</sup>

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\* Professor of Law, Marquette University Law School. I would like to thank Professor Robert Vischer for inviting me to the conference at which this article was to be, but ultimately was not, delivered. I would also like to thank the editors of the *University of St. Thomas Law Journal* for nevertheless including it in their publication of the conference proceedings.

1. ROBERT BOLT, *A MAN FOR ALL SEASONS*, act I (1960). Sir Thomas More was beatified by Pope Leo XIII in 1886 and designated the Patron Saint of Statesmen, Politicians, and Lawyers by Pope John Paul II in 2000.

2. See, e.g., John F. Kennedy, Address to the Ministerial Association of Greater Houston (Sept. 12, 1960), available at <http://usinfo.state.gov/usa/infousa/facts/democrac/66.htm> (last visited Oct. 18, 2006). For commentary, see Mark S. Massa, *A Catholic for President? John F. Kennedy and the "Secular" Theology of the Houston Speech, 1960*, 39 J. CHURCH & STATE 297 (1997). A compilation of Kennedy's various comments on the matter can be found at [http://www.adherents.com/people/pk/John\\_F\\_Kennedy.html](http://www.adherents.com/people/pk/John_F_Kennedy.html).

3. Kennedy, *supra* note 2.

4. See Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13 (1984).

The public may also have noticed that this position of detachment is not confined to the political branches, and that judges and judicial nominees have embraced or expressed it as well. For example, it has been the standard response of Catholic Supreme Court nominees when, during Senate confirmation hearings, they are questioned about the relationship between their faith and their jurisprudence.<sup>5</sup> It has also been the response of judges, Catholic and other, who are asked to remove themselves from a case due to their religious beliefs or affiliation, or of the courts that have addressed such removal questions.<sup>6</sup>

What the general public may not be familiar with, however, is the extent to which this detached posture is potentially at odds with Catholic church doctrine regarding the obligations of civil officials.<sup>7</sup> Indeed, nearly half a century after Kennedy's speech—or, for that matter, over two hundred years after the nation's founding—an ecclesiastically acceptable means for resolving conflicts between religious and civil obligations has yet to be satisfactorily identified and implemented by the American bench.

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5. See Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1049, 1062–65 (1990) (setting forth positions of then-Supreme Court nominees William Brennan, Antonin Scalia, and Anthony Kennedy, each disavowing the influence of their Catholic faith upon their decision making, and concluding that “Justices identified with Catholicism have been forced to proclaim the practical meaninglessness of that identification”). More recently, during their confirmation hearings, now-Chief Justice Roberts and Justice Alito were similarly questioned about, and similarly disavowed, the influence of their Catholic faith on their judicial decision making. See Gregory A. Kalscheur, *Conscience, the Constitution, and the Role of the Catholic Judge*, at 7–8, Lecture at Marquette University, Milwaukee, Wis. (Aug. 30, 2006) (on file with author), available at [http://www.jesuitswisprov.org/pdf/Kalscheur\\_Presentation\\_text.pdf](http://www.jesuitswisprov.org/pdf/Kalscheur_Presentation_text.pdf).

6. See, e.g., *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995) (order of Noonan, J.); *Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984), cert. denied, 470 U.S. 1028 (1985); *State v. Freeman*, 507 F. Supp. 706, 729–33 (D. Idaho 1981); Jake Garn & Lincoln C. Oliphant, *Disqualification of Federal Judges under 28 U.S.C. § 455(a): Some Observations on and Objections to an Attempt by the United States Department of Justice to Disqualify a Judge on the Basis of His Religion and Church Position*, 4 HARV. J.L. & PUB. POL'Y 1, 49–59 (1981) (discussing *Freeman*); John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 346–48 (1998). In turn, “[C]ourts have consistently held that membership in a church does not create sufficient appearance of bias to require recusal.” *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 660 (10th Cir. 2002) (citing cases); Teresa S. Collett, *“The King’s Good Servant. But God’s First”: The Role of Religion in Judicial Decisionmaking*, 41 S. TEX. L. REV. 1277, 1280–86 (2000) (discussing several cases). As one commentator notes,

“[R]eligious background alone should not be a proper basis for disqualification. Otherwise, a Jewish judge, for instance, could not hear cases affecting Jewish interests, such as the constitutionality of Sunday closing laws, nor could Catholic judges sit in cases affecting Catholics as a group. A judge’s religious background, like his race or ethnic background, should not be presumed to affect his ability to execute his judicial duties faithfully and impartially.”

Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 686 (1985).

7. See Kalscheur, *supra* note 5, at 9 (noting the U.S. “bishops’ frustration with this sort of separation of personal conscience from political policy”).

The argument advanced in this article essentially has three components. First, it contends that the potential for such conflict will always exist and that trying to avoid it by either strategic ignorance or attempted detachment is, from a number of perspectives, an inadequate avenue of resolution. Second, especially given a general lack of direct and authoritative church teaching on the matter, each judge is individually obligated, by exercising the prerogative of a well-formed conscience, to resolve the conflict as it may arise from case to case. In discharging this obligation, the judge should ideally reach an outcome—even if this occasionally means recusal—that is consistent both with the church's teachings and their natural implications, and with the professional responsibilities that attend the judicial role. Third, if the result is recusal or anything else out of the ordinary, and if court rules or customs so require, the judge should be willing to explain the basis for his or her decision, assuming that the judge also employs an appropriate level of prudence.

In developing this argument, the article will proceed as follows. Part I will focus on the various sources of authority to which one might look to define a judge's religious obligations, including the obligation to affirmatively discern conflicts between the judge's church and civil duties. Part II will then address the empirical reality or probability that such conflicts occur, and, finding that they almost certainly do, will then assess the defensibility of the detachment model. Upon determining that detachment is not an acceptable posture for judges, Part II will then describe how a judge might confront potential conflicts of obligation between church and state.

Importantly, this article does not focus on the necessity, desirability, or defensibility of such detachment in a liberal democracy from the point of view of political theory, history, sociology, law, or any number of other disciplines.<sup>8</sup> Many have written ably on such matters,<sup>9</sup> including these matters' specific application to Catholic judges<sup>10</sup> and their implications for the

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8. Nor does this article address the specific question of whether having a Catholic majority on the Supreme Court will or should lead to altered methodologies or outcomes. For one view, see Matthew J. Franck, *The Unbearable Unimportance of the Catholic Moment in Supreme Court History*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 447 (2006) (recognizing the historical significance of having a Catholic majority, but arguing that it should not make, or should not have made, any difference to the confirmation process). A few scholars have examined the question of whether Catholic justices in the past have based their decisions in some way on their Catholicism. See, e.g., Phillip Thompson, *Silent Protest: A Catholic Justice Dissent in Buck v. Bell*, 43 CATH. LAW. 125 (2004).

9. See, e.g., KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 141–50 (1995); MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* 102–04 (1997); Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989); Wendell L. Griffen, *The Case for Religious Values in Judicial Decisionmaking: A Normative Perspective*, 81 MARQ. L. REV. 513 (1998).

10. See, e.g., James L. Buckley, *The Catholic Public Servant*, FIRST THINGS, Feb. 1992, at 18; Garvey & Coney, *supra* note 6; William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE L. & POL'Y REV. 347, 355–58 (2006).

nomination and confirmation processes.<sup>11</sup> The article's focus, instead, is whether the *Catholic Church* permits civil judges—including the new and unprecedented Catholic majority on the Supreme Court—to advocate or employ a posture of detachment when interpreting, applying, or fashioning the law.<sup>12</sup>

### I. POTENTIAL CHURCH DOCTRINE CONCERNING JUDICIAL OBLIGATIONS

As interesting and important as this inquiry is, what one finds at the outset is that there are few if any authoritative church documents that speak directly to, or clearly about, a judge's specific obligations. Certainly "[t]here is no official church teaching that defines how Catholic judges should interpret the United States Constitution."<sup>13</sup> Most often the church's focus is on legislators or on executive or administrative officials.<sup>14</sup> There are even statements on the duties of the ordinary citizen.<sup>15</sup> As for judging,

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11. D'Army Bailey, *The Religious Commitments of Judicial Nominees*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 443 (2006); Francis J. Beckwith, *Taking Theology Seriously: The Status of the Religious Beliefs of Judicial Nominees for the Federal Bench*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 455 (2006).

12. There is some scholarship addressing this question as it relates specifically to criminal punishment, especially the death penalty. See Garvey & Coney, *supra* note 6; Michael R. Merz, *Conscience of a Catholic Judge*, 29 U. DAYTON L. REV. 305 (2004); Patrick J. Smith, Note, *A Method for the Madness: Restorative Justice as a Valid Mode of Punishment and an Advancement of Catholic Social Thought*, 44 J. CATH. LEGAL STUD. 433 (2005).

13. Kalscheur, *supra* note 5, at 12 (noting further that "[s]uch a question is beyond the competence of the Church's teaching office").

14. See, e.g., Pope John Paul II, *Evangelium Vitae* pt. 73 (Mar. 25, 1995) ("In the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it, or to 'take part in a propaganda campaign in favour of such a law, or vote for it.'") (quoting Congregation for the Doctrine of the Faith, *Declaration on Procured Abortion*, No. 22: AAS 66, 744 (Nov. 18, 1974)), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html); Congregation for the Doctrine of the Faith, Prefatory Paragraph, *Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life* (Nov. 24, 2002) [hereinafter *Doctrinal Note*] ("This Note is directed to the Bishops of the Catholic Church and, in a particular way, to Catholic politicians and all lay members of the faithful called to participate in the political life of democratic societies."), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20021124\\_politica\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html). According to Professor Doug Kmiec, "[R]epeatedly and circumspectly, the Church's teaching is directed at 'elected officials' or those casting 'a legislative vote.'" *Catholic Judges, the U.S. Constitution and Natural Law*, Interview with Douglas Kmiec, YOUR CATHOLIC VOICE, Aug. 30, 2005, available at <http://www.yourcatholicvoice.org/insight.php?article=2497>.

15. See, e.g., *Doctrinal Note*, *supra* note 14; see also U.S. Conf. of Catholic Bishops, *Faithful Citizenship: A Catholic Call to Political Responsibility* (2003), available at <http://www.usccb.org/faithfulcitizenship/faithfulcitizenship03.pdf>; Archbishop Raymond L. Burke, *On Our Civic Responsibility for the Common Good* (Oct. 1, 2004), available at <http://www.ewtn.com/library/bishops/burkecom.htm>; [http://www.archdiocese.org/commoffice/2004/letters/10-01-04-civic\\_responsibility.pdf](http://www.archdiocese.org/commoffice/2004/letters/10-01-04-civic_responsibility.pdf); Stephen F. Torraco, *A Brief Catechism for Catholic Voters* (2002), available at [http://www.ewtn.com/vote/brief\\_catechism.htm](http://www.ewtn.com/vote/brief_catechism.htm); CATHOLIC ALLIANCE, *VOTING FOR THE COMMON GOOD: A PRACTICAL GUIDE FOR CONSCIENTIOUS CATHOLICS* (2006), available at <http://thecatholicalliance.org/new/files/Voting-for-the-Common-Good.pdf>.

however, one must extrapolate or engage in analogous reasoning in order to discern the appropriate significance of the church's moral teachings.

This Part will engage in such an analysis, although it will do so in a tentative rather than a conclusive way. In my view, complicated analyses of church doctrine are best undertaken, and the resulting statements of lay obligations best promulgated, *not* by law professors, but rather by the episcopacy as a matter of authority or, in some cases, by faithful and trained theologians. The present objective, accordingly, is to identify the various authorities to which Catholic judges could refer when attempting to define their particular duties on the bench. These include church statements concerning the obligations of other civil officers; statements from high-ranking or well-regarded church officials; the writings of other clergy as well as faithful, trained theologians; more general church doctrines that could be specifically applied to a judge's circumstances; and last, but obviously not least, whatever lessons one might draw from the life of Christ or from the early church, as long as one's interpretations do not contradict current church teachings.

As noted, most of the authoritative church statements that address civic duties in regard to law or public policy appear largely focused on legislators, other elected politicians, and voters. According to a 2002 *Doctrinal Note* of the Congregation for the Doctrine of the Faith, then headed by Cardinal Ratzinger (now Pope Benedict XVI), "[A] well-formed Christian conscience does not permit one to vote for a political program or an individual law which contradicts the fundamental contents of faith and morals."<sup>16</sup> So, for example, "[T]hose who are directly involved in lawmaking bodies have a 'grave and clear obligation to oppose' any law that attacks human life. For them, as for every Catholic, it is impossible to promote such laws or to vote for them."<sup>17</sup> Moreover,

[In] the situation in which it is not possible to overturn or completely repeal [such] a law . . . which is already in force or coming up for a vote, "[a]n elected official . . . could licitly support proposals aimed at limiting the harm done by such a law and at lessening its negative consequences at the level of general opinion and public morality."<sup>18</sup>

If the judicial office and functions were just like that of the legislature, then the preceding language would seem to impose a significant limitation on judicial decision making, just as it currently does for legislating. But it is hardly clear that this language is aimed at judges. First, judges really do not "vote for," "promote," or have the ability to "repeal" laws, nor are they ordinarily considered "law-making bodies," though it is true that they pos-

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16. *Doctrinal Note*, *supra* note 14, at pt. 4.

17. *Id.* (quoting *Evangelium Vitae*, *supra* note 14, at pt. 73).

18. *Id.*

sess the authority “to overturn” laws as long as doing so accords with accepted methodologies of their civil institutions. Second, the nature and obligations of judging, as Professor Gregory Kalscheur, S.J., recently noted, can be materially different from those of legislating.<sup>19</sup> “While the role of the legislator is to shape policy in order to best promote the common good,” notes Kalscheur, “the [primary] role of the judge is . . . to use the tools of legal analysis to interpret the Constitution and laws and to apply those laws as they exist in the context of deciding individual cases.”<sup>20</sup> Unlike legislators, in other words, “[i]t is not the role of the judge to reshape the law to conform to his or her personal convictions about what the law ought to be.”<sup>21</sup> Third and finally, judges, when compared to legislators, also face a different set of professional ethical obligations, such as impartiality, as well as a potentially different set of prudential considerations.<sup>22</sup>

Collectively, these points of difference suggest that, while a judge’s obligations under church doctrine, whatever they are determined to be, may ultimately bear similarities to the obligations of legislators, any such similarities likely reflect the coherence of church doctrine rather than a true likeness between the judicial and legislative offices. They also suggest that, in the end, the relevance and authoritativeness of judge-related rules—based entirely on extrapolations from, or analogies to, the responsibilities of legislators—are potentially quite limited.

Accepting this limitation does not end the inquiry, of course, but it does indicate that the inquiry’s scope must be expanded. In turn, one can attempt to identify and assess papal statements, or statements by bishops’ conferences, that may not carry the full weight of the church’s teaching authority, but may be persuasive or otherwise instructive. For example, according to a news report in 1949:

Pope [Pius XII] listed four principles for a Catholic judge to follow: 1) He “cannot shirk responsibility for his decisions and place the blame on the law and its authors. When he delivers a sentence in accordance with the law, the judge becomes an accessory to the fact and therefore is equally responsible for its results.” 2) The judge “can never pass a sentence which would oblige those affected by it to perform an intrinsically immoral act. . . .” 3) “Under no circumstances can a judge acknowledge and approve an unjust law. . . . Therefore he cannot pass a sentence that would be tantamount to approval of it.” 4) “However . . . the judge

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19. See Kalscheur, *supra* note 5, at 9–11.

20. *Id.* at 11 (citing Avery Cardinal Dulles, *Catholic Social Teaching and American Legal Practice*, 30 *FORDHAM URB. L.J.* 277, 287–88 (2002)); Pryor, *supra* note 10, at 355–58).

21. Kalscheur, *supra* note 5, at 11.

22. See Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 *MARQ. L. REV.* 537, 563–67 (1998).

may—sometimes even must—allow the unjust law to run its course, if this is the only way to avoid a greater evil.”<sup>23</sup>

The precise weight to accord these guidelines is not entirely clear. But absolute authoritativeness is hardly required in order to call into question the model of detachment, which they most certainly do. The guidelines, in fact, seem to impose limitations on judges quite similar to those imposed on legislators and, in so doing, indicate that neither legislators nor judges can avoid the actual and overall moral significance of their decisions, despite differences between their respective roles and responsibilities.<sup>24</sup>

Another alternative in the absence of direct and binding church doctrines is to identify more basic or underlying church teachings, whether illuminated by the church itself or by the laity. One such teaching is the longstanding prohibitory doctrine of cooperation or complicity with evil,<sup>25</sup> which effectively precludes Catholics from ignoring or disassociating themselves from the full moral import of their conduct. By looking to this doctrine, for example, John Garvey and Amy Coney were aided in their analysis of whether, or to what extent, the judges can participate in the legal processes that culminate in capital punishment.<sup>26</sup> It is also a concern about which the United States Conference of Catholic Bishops has written with some force. “Those who formulate law,” the Conference has said, “have an obligation in conscience to work toward correcting morally defective laws, lest they be guilty of cooperating in evil and in sinning against the common good.”<sup>27</sup> Consistent with teachings and statements from the Vatican, how-

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23. *Which Law?*, TIME, Nov. 21, 1949, at 1, available at <http://www.time.com/time/magazine/article/0,9171,856320,00.html>. Another non-Magisterial monograph, authored by a Roman Catholic cleric and published just four years later, is JOHN D. DAVIS, *THE MORAL OBLIGATIONS OF CATHOLIC CIVIL JUDGES* (1953).

24. Indeed, some have suggested that judges may have greater limitations. See, e.g., John J. Dilulio, Jr., *The Catholic Voter: A Description with Recommendations*, COMMONWEAL, Mar. 24, 2006, at 10, available at 2006 WLNR 1638361 (“Arguably, democratically elected public officials have more, not fewer, legitimate reasons than life-tenure justices do to compromise their Catholic beliefs when deciding what positions to take on given issues.”), available at [http://www.commonwealmagazine.org/article.php?id\\_article=1565](http://www.commonwealmagazine.org/article.php?id_article=1565).

25. See JAMES T. BRETZKE, *A MORALLY COMPLEX WORLD: ENGAGING CONTEMPORARY MORAL THEOLOGY* 223 (2004) (defining cooperation with evil, or *cooperatio in malum*, as a “[t]raditional term that is divided into two major categories, formal and material cooperation, plus a number of further specifications and distinctions. One can never cooperate ‘formally’ in the sense of sharing the same evil intent of another, but in the actual world we all at some time or another find ourselves in situations of ‘material’ cooperation, in which *de facto* our actions abet the commission of a morally bad action by another.”).

26. See Garvey & Coney, *supra* note 6. Then-Professor Garvey has since become the Dean of the Boston College Law School, and then-judicial clerk Coney, now Amy Coney Barrett, has become a professor at the Notre Dame Law School.

27. U.S. CONF. OF CATHOLIC BISHOPS, *CATHOLICS IN POLITICAL LIFE* (2004), available at <http://www.usccb.org/bishops/catholicsinpoliticallife.shtml>.



ever, the bishops' language in the first instance seems directed mostly at legislators.<sup>28</sup>

In turn, one can ask whether it is possible for a judge to hear and decide *every* matter set before him and not cooperate with evil. He could do this either *formally*, which means that the judge consciously harbors a bad intent while facilitating another's gravely immoral conduct, or *materially but unacceptably*, meaning the judge does not consciously harbor a bad intent, but nevertheless facilitates gravely immoral conduct by another and does so to a morally unacceptable extent or in a morally unacceptable way. On the surface, at least, it seems unlikely that this is in fact possible, although there are many variables, such as the judge's jurisdictional scope or the overall morality of the legal system in which the judge functions, that can increase or decrease this apparent unlikelihood.

In addition to the prohibition on formal or unacceptable material cooperation with evil, the Catholic judge can also assess his decision making in light of the instructions and examples that Christ Himself provided by His life, death, and resurrection, including His own encounters with the judicial processes of His time. Speaking with regard to legal practice, for example, Professor John Breen noted the significance of the Christian realities of creation and especially the Incarnation:

Because Christ was Himself a victim who wrongfully suffered at the hands of others, you should be able to find Him in those who are victimized today—the personal injury plaintiff who was crippled by the negligence, greed, or indifference of another, the worker who was not hired because of the color of her skin, and the child who was abandoned, abused, or neglected by his parents. . . .

But you must go beyond this. . . . You must find Him not only in the innocent client who is a sympathetic victim, but in the guilty person whom the state would condemn to death. . . . [I]ncivility, mistakes in judgment, and even criminal guilt, cannot erase the dignity that every human person enjoys by virtue of God's love revealed in the wonder of the Incarnation. It will not always be easy to see the world in this way, but this is the demand of your faith, this is the call of your baptism.<sup>29</sup>

As with lawyers, must a judge strive to perceive Christ in the attorneys, parties, witnesses, and jurors in his courtroom? In turn, might this

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28. See *supra* note 14 and text accompanying note 19 (addressing this point with regard to Vatican statements). While many readers, including many legal academics, would see no difficulty including judges within the bishops' category of "[t]hose who formulate law," this is likely not the bishops' intent. They did not use words descriptive of the judicial function, such as "interpret," or "apply" or even "enforce." Rather, they used the term "formulate," which most naturally refers to the legislative and perhaps executive process.

29. John M. Breen, Baccalaureate Mass Reflection, *The Catholic Lawyer: Justice and the Incarnation*, 39 CATH. LAW. 269, 274–75 (2000) (footnote omitted).

conceptual shift have a meaningful impact on the judge's perception of the case as a whole, or on particular functions such as assessing credibility or formulating and imposing remedies or sentences? These are complicated normative and empirical questions that cannot properly be answered in this article. Like the other inquiries addressed earlier, however, they certainly call into question the tenability of the detachment thesis so often propounded by Catholic politicians, judges, and judicial nominees.

## II. THE CONFLICT: AN OVERVIEW AND ASSESSMENT

Indeed, it is difficult to proceed through the analysis of Part I and conclude that, even considering their differences from legislators, Catholic judges do *not* have relevant mandates that arise from their faith, and that some of these mandates may conflict with the laws and processes that they are charged to apply. It is difficult to contend, for example, that a Catholic judge can truly be faithful when he authorizes a minor to have an abortion,<sup>30</sup> or, at least in some cases, when he hands down a sentence of death.<sup>31</sup> By the same token, it is hard to imagine that a Catholic judge in the early or mid-1800s seriously believed that he was following Christ while at the same time upholding, or not resisting, the legalized institution of slavery.<sup>32</sup>

Even seemingly mundane decisions, such as evidentiary rulings or the enforcement of procedural rules, may present the possibility of such conflicts. For instance, a judge could arguably be defying his religious obligations to be charitable and to love his neighbor when he dismisses a suit in which a plaintiff, who has been genuinely and significantly injured by the defendant's conduct, loses entirely by procedural default. From the civil standpoint of due process, of course, there may be no violation whatsoever, and most trained lawyers and judges would likely feel only minor discomfort from such an outcome. From the standpoint of church teachings and in light of the example of Christ, however, judges are essentially asked not to measure the justness of their rulings simply by civil legal norms, but instead to ask whether they are fulfilling their roles as faithful Catholics in positions of social responsibility.

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30. See, e.g., Kalscheur, *supra* note 5, at 26–27 (arguing that a judge should, or at least should be allowed to, recuse himself in this situation given the proximity of the material cooperation with evil); cf. Larry Cunningham, *Can a Catholic Lawyer Represent a Minor Seeking a Judicial Bypass for an Abortion? A Moral and Canon Law Analysis*, 44 J. CATH. LEGAL STUD. 379, 405–06 (2005) (arguing that a Catholic lawyer would have to decline representation in such a case, given “the moral reality that he [would otherwise be] assisting a person to commit an act that the Church teaches as unequivocally immoral”).

31. Compare Garvey & Coney, *supra* note 6 (identifying limitations on a Catholic judge's participation in capital cases), and Kalscheur, *supra* note 5, at 30–35 (largely agreeing with Garvey and Coney), with Michael R. Merz, *Conscience of a Catholic Judge*, 29 U. DAYTON L. REV. 305 (2004) (seemingly discerning no limitations).

32. Cf. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (authored by C.J. Taney, the first Catholic Supreme Court justice), *abrogated by* U.S. CONST. amends. XIII & XIV.

Given these examples, both real and hypothetical, not only is the propriety of the detachment model called into question, but so is its empirical defensibility. Even without reference to examples, it is counterintuitive to maintain that total judicial detachment from religious norms or obligations is either achievable as a practical matter or acceptable as a matter of church doctrine and teachings. Some level of conscious detachment can probably be achieved by at least some judges, but that is not how the notion of detachment is presented by its self-identified adherents. Likewise, many or even most judicial decisions can probably be rendered without any defiance of church doctrine, but, again, that is often not how detachment is presented. Rather, judges or nominees who espouse detachment usually speak categorically, explaining that they can and will, without exception, follow the law and execute their legal duties regardless of what their religion might require or forbid in their private lives.

There appears, then, to be at least a partial failure of the detachment model, even on its own terms. This failure, in turn, makes it quite reasonable to infer that many Catholic judges, at some point in their tenure, have in fact faced—or will in fact face—a conflict between their professional and their religious obligations. Unfortunately, many judges never reach the point of discerning these conflicts, much less the task of resolving them when they are identified, precisely because they have adopted a posture of detachment. They have already decided in advance that “conflicts” as such cannot arise, or if they do that they cannot be long-lived, because one’s civil obligations are necessarily superior to one’s religious obligations. No matter how it is recast or reconceptualized, this is, in essence, the foundational operative premise of the detachment model. It basically allows one to avoid recognizing conflicts in the first instance and, should that not succeed, either to ignore them or to “resolve” them by automatically elevating the demands of the civil state above those of one’s religious faith.

The integrity of faith and intellect, however, demand that such conflicts, even if extremely infrequent, be neither avoided nor ignored. Church teachings become no less binding merely because one chooses not to see them or because one attempts to launder them through a secular theory of appropriate office-holding. Far from lessening one’s duties, in fact, such omissions or commissions merely aggravate the gravity of one’s noncompliance. Even from a non-religious point of view, it becomes reasonable to question the honesty and integrity of a judge who can easily sidestep obligations which in a different setting the judge might freely admit are of fundamental importance.

The irony, perhaps, is that the church probably recognizes a greater degree of conscience-based discretionary decision making—particularly in areas of moral and technological complexity—than judges may think. As long as the church expressly or implicitly acknowledges room for legitimate disagreement and outcomes in relation to a particular subject, those exercis-

ing well-formed consciences may properly reach different outcomes without jeopardizing their role as civil judges or their status as faithful Catholics. This approach, however, is not unconditional, which may very well explain why it is often rejected in favor of detachment.

For one thing, a judge who attempts to walk this path can no longer dictate unilaterally the direction the path will take. The judge has acknowledged a limited authority over the definition of his or her obligations to either the state or the church. In fact, the judge may periodically have to recuse himself or herself from particular cases, or, in the extreme scenario, may have to forfeit judicial office altogether. For another thing, the path of acknowledgement can be significantly more onerous than that of detachment. Not only must the judge now affirmatively recognize conflicts when they emerge, the judge can no longer automatically resolve the conflict in favor of the civil government. Rather, the judge must undertake what may be a complicated assessment of his or her respective duties to church and state.

Before examining how a judge might actually attempt to resolve such a conflict, it is important to reflect on or assess the significance of recognizing the conflict itself. Most importantly, it is arguably too simplistic to assume that the existence of such conflicts is a negative or undesirable component of judging. History would suggest quite the opposite: judicial conflicts of conscience ought to be appreciated, not lamented. This is because, without judges who possess higher or external moral obligations, a nation or society sets the stage for greater injustice and tyranny. As noted by the character of Sir Thomas More in *A Man for All Seasons*, judges who lack these higher duties will “lead their country by a short route to chaos.”<sup>33</sup> This, in many respects, is the teaching of Ingo Muller’s *Hitler’s Justice*, which details the complicity of the bench in the political and moral violations of the Nazi regime.<sup>34</sup>

Appreciating the conflict does not, of course, resolve it. From what source or in what forum, then, must its resolution arise? The Constitution certainly does not resolve it, and actually invites it by ensuring that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States,”<sup>35</sup> and that the government “shall

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33. *A MAN FOR ALL SEASONS* (Highland Films 1966).

34. See INGO MULLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider trans., 1991); see also Stanley Kramer, *JUDGMENT AT NUREMBERG* (United Artists 1961) (film) (examining the criminal culpability of, among others, German judges).

35. U.S. CONST. art. VI, § 3. Regarding the clause’s relevance for the judiciary, see Francis J. Beckwith, *The Court of Disbelief: The Constitution’s Article VI Religious Test Prohibition and the Judiciary’s Religious Motive Analysis*, 33 HASTINGS CONST. L.Q. 337 (2006); Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1987); ERWIN CHEMERINSKY, JOHN ROBERTS AND THE ESTABLISHMENT CLAUSE AND THE ROLE OF THE RELIGIOUS TEST CLAUSE IN THE CONFIRMATION PROCESS (Aug. 2005), available at [http://www.acslaw.org/files/2005%20programs\\_Chemer-](http://www.acslaw.org/files/2005%20programs_Chemer-)

make no law respecting the establishment of religion or prohibiting the free exercise thereof.”<sup>36</sup> Under these provisions, a judicial nominee cannot (or at least should not) be denied confirmation solely because of his church affiliation or degree of devoutness. As for the church itself, it can only instruct the faithful; it cannot reverse or stay a judge’s decision.<sup>37</sup> It may deny certain sacraments to the wayward judge (except for the Sacrament of Reconciliation), but the church lacks the jurisdiction to enforce its teachings and mandates in a civil courtroom.

The necessary forum, then, must be the properly-formed conscience of the judge himself, whereby *proper* moral formation (1) contemplates meaningful knowledge and appreciation of the church’s authority and teachings, and (2) necessarily precludes active participation in or approval of conduct that “contradicts the fundamental contents of faith and morals.”<sup>38</sup> Under this approach, each judge in every case (and perhaps at multiple stages of the same case) must proactively determine whether a conflict exists. If one does, the judge must further assess whether the conflict is resolvable absent recusal or resignation, and, if not, to choose between these options.<sup>39</sup>

Relevant authorities to which judges engaged in this analysis may look would obviously include the types of authority referenced in Part I of this article, such as the teachings or statements of the church or of the Pope, bishops’ conferences, or even individual bishops or priests; the nature of Christ as recorded in the Gospels and as elaborated in other sources; the examples of St. Thomas More and other canonized or revered members of the church; the writings of professional and faithful theologians; and the

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36. U.S. CONST. amend. I. The Establishment and Free Exercise Clauses appear, at the state level, to be as prohibitive of religious tests as the Religious Test Clause itself. See, e.g., *McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating a state constitutional provision prohibiting any member of the clergy from serving in the state legislature); *Torcaso v. Watkins*, 367 U.S. 488, 489 (1961) (invalidating a state constitutional provision requiring “a declaration of belief in the existence of God” as a qualification for public office); *Silverman v. Campbell*, 486 S.E.2d 1 (S.C. 1997) (affirming the invalidation of two state constitutional provisions requiring affirmation of the existence of a “Supreme Being” as a qualification for public office). More generally, the Court has declared that pursuant to the First Amendment the government may not “impose special disabilities on the basis of religious views or religious status.” *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

37. See *Doctrinal Note*, *supra* note 14, at pt. 6 (“By its interventions in this area, the Church’s Magisterium does not wish to exercise political power or eliminate the freedom of opinion of Catholics regarding contingent questions. Instead, it intends—as is its proper function—to instruct and illuminate the consciences of the faithful, particularly those involved in political life, so that their actions may always serve the integral promotion of the human person and the common good. The social doctrine of the Church is not an intrusion into the government of individual countries. It is a question of the lay Catholic’s duty to be morally coherent, found within one’s conscience, which is one and indivisible.”).

38. *Id.* at pt. 4 (referring to the limits of a legislator’s well-formed conscience).

39. See *Kalscheur*, *supra* note 5.

experiences of the judge's Christian contemporaries on or off the bench. Such an approach is obviously more demanding than either the fictional notion of detachment or the notion that Catholics simply ought not serve as judges. But it is demanding precisely because it requires the judge to exercise both his faith and his reason—which is to say, the entirety of his conscience in light of the church's teachings—and not succumb to simplistic or extreme models of judicial decision making that deny either the nature of reality or the obligations of morality.

Once the judge has decided upon a resolution, there remains the question of when, if ever, the judge is required to disclose the existence of the conflict and the resolution that the judge pursues. Generally speaking, it is not obvious that the church has anything specific to say about this question. Instead, this inquiry seems to be exactly the sort of matter that the judge himself or herself should resolve on largely prudential grounds, taking into account the necessity, efficacy, benefits, and potential adverse effects of making such a disclosure.<sup>40</sup> That said, a judge probably should make this sort of disclosure if the resolution of the conflict entails recusal or anything else out of the ordinary and if the civil court's rules or customs so require, at least to the extent that the judge's silence under such circumstances could do more harm than good to the public's and the parties' confidence in that judge and in the judicial system as a whole.

### III. CONCLUSION

It is not always easy to be either a Catholic or a judge, and their combination seems only to create additional and even more difficult problems. Today, the prevailing view, apparently, is that when a Catholic judge's religious obligations and judicial responsibilities collide, he should simply set the former aside in order to fulfill the latter. Such a view, however, is no less unpersuasive in the judicial context, and certainly no more persuasive, than it is in the legislative and executive contexts. It rests on a caricature of both judicial decision making and religious faith, and it does not fully accord with the actual obligations that the church arguably imposes on judges. A better and more honest approach would be to acknowledge the true nature of these variables, to allow each judge to identify the actual conflicts of conscience that may be before him, and then to respect the judge's resolution of those conflicts if and when they arise.

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40. Regarding the interplay between judicial candor and prudence, though without particular regard for Church teachings, see Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 *TEX. L. REV.* 1307, 1397 (1995).