

# The Religious Faith and Judicial Duty of an American Catholic Judge

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## INTRODUCTION

In recent years there has been public debate about the role of religious faith in the performance of judicial duty, especially the role of the Catholic faith in the performance of the duties of a federal judge. During my confirmation hearing in June 2003,<sup>1</sup> a few members of the Senate Judiciary Committee raised questions about my “deeply held”<sup>2</sup> beliefs, and whether I was “asserting an agenda of [my] own, a religious belief of [my] own, inconsistent with separation of church and state.”<sup>3</sup> When Chairman Hatch responded to these statements by asking me about my religion<sup>4</sup> and then asserting that “in every case” he could see, I had “followed the law regardless of [my] personal, deeply felt, strongly felt religious beliefs,”<sup>5</sup> two other Senators objected to Chairman Hatch’s reference to my religion.<sup>6</sup>

Later that summer, an interest group sponsored political advertisements that described opponents of my confirmation to the federal bench as engaged in discrimination against me based on my Catholic faith.<sup>7</sup> The advertisement portrayed a sign that read, “Catholics need not apply,” hanging on a door to a

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† Circuit Judge, United States Court of Appeals for the Eleventh Circuit. I was assisted in my thinking about the subject of this Essay by my participation in a panel discussion of the role of religion in judging at the 2005 Sarah Smith Memorial Conference on Moral Leadership organized by the Yale Center for Faith and Culture and jointly sponsored by the Yale Law School and the Yale Divinity School. I am indebted to the participants in that panel discussion, especially our moderator, Professor Stephen Carter. I also thank Thomas Berg, Gerard Bradley, Robert P. George, and Jay Sekulow for their comments and suggestions about an earlier draft of this Essay. On January 24, 2006, I delivered an earlier version of this Essay at the University of Notre Dame as the inaugural of its lecture series “Catholic Think Tank America.”

1. *Confirmation Hearing on the Nomination of William H. Pryor, Jr. to be Circuit Judge for the Eleventh Circuit Before the S. Comm. on the Judiciary*, 108th Cong. (2003).

2. *Id.* at 11-13 (statement of Sen. Charles Schumer).

3. *Id.* at 90 (statement of Sen. Richard Durbin); *see also id.* at 76 (statement of Sen. Dianne Feinstein).

4. *Id.* at 104-05 (statement of Sen. Orrin Hatch).

5. *Id.* at 106 (statement of Sen. Orrin Hatch).

6. *Id.* at 107-08 (statements of Sen. Patrick Leahy and Sen. Arlen Specter).

7. Charles Hurt, *Democrats Target Religious Belief of Bush Judicial Nominee*, WASH. TIMES (Nat'l Wkly. Ed.), July 28, 2003, at 5.

federal courthouse.<sup>8</sup> That advertisement created a furor in the Senate and a lively debate in national newspapers and magazines.<sup>9</sup>

In 2005, controversies arose about the religious faith of nominees to the Supreme Court. After John Roberts was nominated to serve as Chief Justice, there was a report that a Senator had asked Roberts in a private meeting what Roberts would do in a conflict between his Catholic faith and the performance of his judicial duty. Roberts allegedly said he would recuse himself.<sup>10</sup> The report provoked a firestorm of criticism,<sup>11</sup> but the Senator asserted that the report was erroneous.<sup>12</sup> Later, when Harriet Miers was nominated to serve as an associate justice, there was a debate about the relevance of her evangelical Christian faith to both her nomination and possible service as a judge.<sup>13</sup> After Ms. Miers asked the President to withdraw her nomination, a new controversy arose when another Catholic, Sam Alito, was nominated to the Supreme Court. The Alito nomination sparked new questions, because his appointment would mean that a majority of five of the nine members of the Supreme Court would be Catholic.<sup>14</sup>

8. *Id.*

9. See, e.g., Richard John Neuhaus, *The Public Square*, FIRST THINGS, Oct. 2003, at 91-92; Charles Krauthammer, Editorial, *A Judge Prejudged*, WASH. POST, Aug. 29, 2003, at A23; John Mallon, Op-Ed., *Bias and Judicial Nominees*, WASH. TIMES, Aug. 12, 2003, at A15; Robert Novak, Editorial, *Unmasking Religious Code Words*, CHI. SUN-TIMES, Aug. 11, 2003, at 37; Editorial, *Playing the Religion Card*, N.Y. TIMES, Aug. 4, 2003, at A12; Terry Eastland, *Catholic Baiting*, DAILY STANDARD, Aug. 6, 2003, <http://www.theweeklystandard.com/Content/Public/Articles/000/000/002/957edgkx.asp>; Ami Eden, *Confirmation Debate Morphs into Bitter Religious Battle*, FORWARD, Aug. 8, 2003, <http://www.forward.com/issues/2003/03.08.08/news4.html>; Jonah Goldberg, *Dems Want To Bench Judges of Faith*, TOWNHALL.COM, Aug. 6, 2003, <http://www.townhall.com/opinion/columns/jonahgoldberg/2003/08/06/160933.html>; Hugh Hewitt, *The Catholic Test*, DAILY STANDARD, Aug. 5, 2003, <http://www.weeklystandard.com/Content/Public/Articles/000/000/002/956qpnrx.asp>; Michael Novak, *"Deeply Held" Feelings*, NAT'L REV. ONLINE, Aug. 4, 2003, <http://www.nationalreview.com/novak/novak080403.asp>.

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

11. See Charles Hurt, *Durbin Disputes Column on Roberts*, WASH. TIMES, July 26, 2005, at A12 [hereinafter *Durbin Disputes*]; Charles Hurt, *Durbin Was Source for Column About Roberts*, WASH. TIMES, July 27, 2005, at A10 [hereinafter *Durbin Was Source*]; David D. Kirkpatrick, *Skirmish over a Query About Roberts's Faith*, N.Y. TIMES, July 26, 2005, at A13; Letter from Henry J. Hyde, Congressman, U.S. Congress, to Richard Durbin, Senator, U.S. Senate (July 28, 2005), available at <http://www.frc.org/get.cfm?i=LH05G07&v=PRINT>; see also, e.g., E.J. Dionne, Jr., Editorial, *Why It's Right to Ask About Roberts's Faith*, WASH. POST, Aug. 1, 2005, at A13, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/01/AR2005080101430.html>; Cathy Young, Op-Ed., *Why Roberts's Religion Matters*, BOSTON GLOBE, Aug. 1, 2005, at A11; *Meet the Press* (MSNBC cable television broadcast Aug. 7, 2005) (Interview by Tim Russert of Mario Cuomo and Douglas Kmiec), available at <http://www.msnbc.msn.com/id/8714275>.

12. *Durbin Disputes*, *supra* note 11; *Durbin Was Source*, *supra* note 11.

13. See, e.g., Thomas L. Friedman, *Leading by (Bad) Example*, N.Y. TIMES, Oct. 19, 2005, at A21; William F. Buckley, Jr., *So She's a Christian?*, NAT'L REV. ONLINE, Oct. 21, 2005, <http://www.nationalreview.com/buckley/wfb200510211621.asp>; *Bush Cites Religion as Reason for Picking Miers*, MSNBC.COM, Oct. 12, 2005, <http://www.msnbc.msn.com/id/9673338>; *The NewsHour with Jim Lehrer* (PBS television broadcast Oct. 14, 2005) (Interview by Jim Lehrer of David Brooks and Mark Shields), available at [http://www.pbs.org/newshour/bb/political\\_wrap/july-dec05/sb\\_10-14.html](http://www.pbs.org/newshour/bb/political_wrap/july-dec05/sb_10-14.html).

14. Lynette Clemetson, *Alito Could be 5th Catholic on Current Supreme Court*, N.Y. TIMES, Nov. 1, 2005, at A23; *The Papal Court: The Supreme Court goes over to Rome*, ECONOMIST, Jan. 28, 2006, at

Although this Essay will address questions raised by these recent events, I will not offer any opinion about these incidents. Those matters must be left to historians. As a judge, I am more interested in the present and recurring issue of the role of religion in judging than in the history of judicial confirmations. Amidst a lack of consensus on the role of religious faith in judging, I will offer my perspective on the public duties of an American Catholic judge.

Long before the recent judicial confirmation hearings, there existed a debate among legal experts about the role of religious faith in judging. In a 1989 lecture at Notre Dame Law School, Yale Law Professor Stephen Carter argued that “the religiously devout judge ought to be free to rest her moral knowledge on her religious faith” in the performance of her judicial duty.<sup>15</sup> Other scholars and some judges have since joined in the debate, either to attack or buttress Professor Carter’s argument.<sup>16</sup>

My perspective is that faith properly informs me to take my judicial duty seriously, but that religion should not be applied as a source of authority in judging. Although my Catholic faith is the foundation of my worldview, my public duty is governed, from beginning to end, by the law. Faith properly matters to a judge, and faith is not in tension with fidelity to the law.

In this Essay, I will address three topics in an effort to explain my perspective. First, I will discuss how faith can properly motivate an American Catholic judge. Second, I will examine how the law governs judging. Finally, I will address a judge’s response when moral duty and positive law conflict.

## I. HOW RELIGIOUS FAITH PROPERLY INFORMS A JUDGE IN FIDELITY TO PUBLIC DUTY

Religious faith properly informs me, as a judge, in my fidelity to my public duty in at least four ways: in my understanding of my oath of office, in my moral duties to obey lawful authority, and in my responsibility to work both diligently and honestly. Each of these ways is motivational; that is, each concerns the judge’s duty to perform his work well. None involves using religious doctrine to decide a case in conflict with the law.

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34; Margaret Ramirez & Manya A. Brachear, *With Alito, Catholics Would be Court Majority*, CHI. TRIB., Jan. 13, 2006, at C12.

15. Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 943 (1989).

16. See Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 MARQ. L. REV. 513 (1998); Daniel O. Conkle, *Religiously Devout Judges: Issues of Personal Integrity and Public Benefit*, 81 MARQ. L. REV. 523 (1998); Joan B. Gottschall, *Response to Judge Wendell Griffen*, 81 MARQ. L. REV. 533 (1998); Richard B. Saphire, *Religion and Recusal*, 81 MARQ. L. REV. 351 (1998); see also Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DE PAUL L. REV. 1047 (1990); Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083 (1990); Howard J. Vogel, *The Judicial Oath and the American Creed: Comments on Sanford Levinson’s The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Judges*, 39 DEPAUL L. REV. 1107 (1990); Thomas L. Shaffer, *On Checking the Artifacts of Canaan: A Comment on Levinson’s “Confrontation,”* 39 DEPAUL L. REV. 1133 (1990).

### A. *Faith and the Judge's Oath of Office*

The first and most fundamental way that faith properly matters to me as a judge is in my understanding of my judicial oath of office. The Framers required in Article VI of the Constitution that all the officers of our government, including judges, “be bound by oath or affirmation, to support th[e] Constitution.”<sup>17</sup> In the next part of that clause, they provided that “no religious test shall ever be required as a qualification to any office or public trust under the United States.”<sup>18</sup> The Framers thought that the particular religious beliefs of the judge should not matter, but that it was crucial for the judge to have his conscience—as informed by those beliefs—bound by the Constitution.

Many of the states had a different rule. Delaware, for example, in article 22 of its Constitution of 1776, required officers to “profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and [to] . . . acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration.”<sup>19</sup> Vermont, in chapter 2, section 9, of its Constitution of 1777, required legislators to declare: “I do believe in one God, the Creator and Governor of the universe, the rewarder of the good and punisher of the wicked. And I do acknowledge the scriptures of the old and new testament to be given by divine inspiration, and own and profess the protestant religion.”<sup>20</sup> I am especially grateful that last line of the Vermont Constitution did not become part of the Federal Constitution.

During the ratification process, some Americans objected to the ban of religious tests, as many Protestants feared the election or appointment of Catholics to federal office. James Iredell, a delegate to the North Carolina convention, provided my favorite rejoinder to these objections when he rose to defend the ban on religious tests on July 30, 1787. His words were especially memorable for Catholics. Iredell said,

I met by accident with a pamphlet this morning, in which the author states as a very serious danger, that the Pope of Rome might be elected President. I confess this never struck me before, and if the author had read all the qualifications of a President, perhaps his fears might have been quieted. No man but a native, and who has resided fourteen years in America, can be chosen President. I know not all the qualifications for a Pope, but I believe he must be taken from the college of Cardinals, and probably there are many previous steps necessary before he arrives at this dignity. A native of America must have very singular good fortune, who after residing fourteen years in his own country, should go to Europe, enter into Romish orders, obtain the promotion of Cardinal, afterwards that of Pope, and at length be so much in the confidence of his own country, as to be elected President. It would

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17. U. S. CONST. art. VI, cl. 3.

18. *Id.*

19. 4 THE FOUNDERS' CONSTITUTION 633-34 (P. Kurland & R. Lerner eds., 1987).

20. 4 *id.* at 634.

be still more extraordinary if he should give up his Popedom for our Presidency. Sir, it is impossible to treat such idle fears with any degree of gravity.<sup>21</sup>

“The Framers’ general understanding was that proscribing religious tests did not necessarily remove the religious significance of the general oath.”<sup>22</sup> James Madison, the Father of the Constitution, for example, explained in a letter to Edmund Pendleton dated October 28, 1787, that an oath should make a religious test unnecessary. Madison wrote:

Is not a religious test as far as it is necessary, or would operate, involved in the oath itself? If the person swearing believes in the supreme Being who is invoked, and in the penal consequences of offending him, either in this or a future world or both, he will be under the same restraint from perjury as if he had previously subscribed a test requiring this belief. If the person in question be an unbeliever in these points and would notwithstanding take the oath, a previous test could have no effect. He would subscribe to it as he would take the oath, without any principle that could be affected by either.<sup>23</sup>

Madison’s argument, expressed by others as well, was that a religious believer would take an oath seriously without need of a religious test, and that a religious test could be declared by an unprincipled atheist without fear of punishment after death. Either way, a religious test was unnecessary.

When I placed my left hand on the Holy Bible and swore to “perform all the duties incumbent upon me as United States Circuit Judge under the Constitution and laws of the United States; . . . and [swore] that I [would] well and faithfully discharge the duties of the office on which I am about to enter[,] So Help Me God,”<sup>24</sup> my conscience was and remains affected by my religious beliefs. Undoubtedly, the case is the same for all religious judges. Were it not so, what would be the point of placing my hand on the Bible or ending the oath with the declaration, “So Help Me God”? Taking a false oath is a violation of the second commandment not to take the name of the Lord in vain.<sup>25</sup> As the *Catechism of the Catholic Church* explains, “[t]aking an oath or swearing is to take God as witness to what one affirms. It is to invoke the divine truthfulness

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21. 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, JAN. TO AUG. 1788, at 906 (B. Bailyn ed., 1993).

22. THE HERITAGE GUIDE TO THE CONSTITUTION 295 (E. Meese et al. eds., 2005).

23. JAMES MADISON TO EDMUND PENDLETON, 4 THE FOUNDERS’ CONSTITUTION, *supra* note 19, at 639.

24. The words of the oath for judicial officers are taken from two statutes, 5 U.S.C. § 3331 (2000) and 28 U.S.C. § 453 (2000). The oath reads as follows:

I, [name], do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [office] under the Constitution and laws of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So Help Me God.

THE OATH FOR JUDICIAL OFFICERS (on file with author).

25. CATECHISM OF THE CATHOLIC CHURCH ¶ 2150 (1995).

as a pledge of one's own truthfulness. An oath engages the Lord's name."<sup>26</sup> My entire understanding of my judicial duty flows from taking my oath seriously; James Madison and the other Framers of the Constitution expected nothing less.

### B. *Faith and the Duty To Obey Lawful Authority*

My religious faith also informs my perspective on my judicial duty to obey lawful authority. As a Catholic, I believe I have a moral obligation to obey our government and its laws, while my Christian faith provides the foundation for my public duty to administer the law. Before I became a judge, this perspective informed my decision, as the Attorney General of Alabama, to obey a federal injunction that required the removal of a monument of the Ten Commandments in the Alabama State Judicial Building.<sup>27</sup> My moral duty to obey the law pertains to my judicial duty now just as it pertained to my executive duty then.

The Christian duty to obey the government and its laws is clearly expressed in the New Testament. In Saint Matthew's Gospel, Jesus gave a provocative lesson that, the Catholic Church teaches, involves the moral duty to obey the government: "[G]ive to Caesar what is Caesar's, but give to God what is God's."<sup>28</sup> In his Epistle to the Romans, the Apostle Paul taught, "[l]et everyone obey the authorities that are over him, for there is no authority except from God, and all authority that exists is established by God."<sup>29</sup> And in his first Epistle, Peter wrote, "[b]ecause of the Lord, be obedient to every human institution, whether to the emperor as sovereign or to the governors he commissions for the punishment of criminals and the recognition of the upright. Such obedience is the will of God."<sup>30</sup>

As a judge in a government of laws, not men, I have a special moral duty to obey and enforce the law in accordance with my oath. That moral obligation is consonant not only with Christian teachings, but also with the Code of Conduct for United States Judges, which requires judges to avoid impropriety and its appearance. Canon 2A of that Code requires a judge to "respect and comply with the law and [to] act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."<sup>31</sup>

My moral duty also requires that, when I exercise judicial authority in compliance with the law, I must, as a Catholic, "do so as a service."<sup>32</sup> I am

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26. *Id.*

27. William H. Pryor Jr., *Christian Duty and the Rule of Law*, 34 CUMB. L. REV. 1 (2003); see generally *Moore v. Judicial Inquiry Comm.*, 891 So. 2d 848 (Ala. 2004).

28. *Matthew* 22:21 (New American Catholic).

29. *Romans* 13:1 (New American Catholic).

30. *I Peter* 2:13 (New American Catholic).

31. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A (1999).

32. CATECHISM OF THE CATHOLIC CHURCH ¶ 2235.

bound to follow Christ's teaching: "Anyone among you who aspires to greatness must serve the rest, and whoever wants to rank first among you must serve the needs of all."<sup>33</sup> I must strive, in the words of the *Catechism*, "to respect the fundamental rights of the human person . . . [and] dispense justice humanely by respecting the rights of everyone, especially of families and the disadvantaged."<sup>34</sup>

My moral responsibility, as informed by my faith, again conforms with my oath of office. My oath to "administer justice without respect to persons, and do equal right to the poor and to the rich"<sup>35</sup> clearly echoes the *Catechism's* aforementioned command to respect the "rights of everyone, especially of families and the disadvantaged."<sup>36</sup> My moral obligation also accords with Canon 3 of the Code of Conduct, which instructs judges to "be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity"<sup>37</sup> and to "require court officials, staff, and others subject to [my] direction and control, to observe the same standards of fidelity and diligence."<sup>38</sup>

### C. *Faith and the Duty of Diligence*

My faith informs my judicial duty in a third way, by inculcating me with a belief in the moral duty to work. The Apostle Paul's Second Epistle to the Thessalonians addresses man's obligation to work by declaring "that anyone who would not work should not eat."<sup>39</sup> The *Catechism* explains that work is, in a real sense, a form of prayer:

*Human work* proceeds directly from persons created in the image of God and called to prolong the work of creation by subduing the earth, both with and for one another. Hence work is a duty. . . . Work honors the Creator's gifts and the talents received from him. It can also be redemptive. By enduring the hardship of work in union with Jesus, the carpenter of Nazareth and the one crucified on Calvary, man collaborates in a certain fashion with the Son of God in his redemptive work. He shows himself to be a disciple of Christ by carrying the cross, daily, in the work he is called to accomplish. Work can be a means of sanctification and a way of animating earthly realities with the Spirit of Christ.<sup>40</sup>

This religious belief motivates my commitment to my oath to "well and faithfully discharge the duties of the office"<sup>41</sup> of a circuit judge. Canon 3

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33. *Matthew* 20:26 (New American Catholic).

34. CATECHISM OF THE CATHOLIC CHURCH ¶ 2237.

35. THE OATH FOR JUDICIAL OFFICERS, *supra* note 24.

36. CATECHISM OF THE CATHOLIC CHURCH ¶ 2237.

37. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3A(3).

38. *Id.* Canon 3B(2).

39. *2 Thessalonians* 3:10 (New American Catholic).

40. CATECHISM OF THE CATHOLIC CHURCH ¶ 2427.

41. THE OATH FOR JUDICIAL OFFICERS, *supra* note 24.

requires that I “perform the duties of the office impartially and diligently,”<sup>42</sup> obliging me to “dispose promptly of the business of the court”<sup>43</sup> and “diligently discharge my administrative responsibilities.”<sup>44</sup>

The Catholic judge has a moral duty not only to follow the law, but to administer justice by enforcing it. My position as a judge enables me to fulfill my Christian duty to serve others by helping to sustain the American experiment of liberty in law. In other words, my vocation calls me to serve the moral enterprise of democratic governance and the rule of law.

#### D. *Faith and the Duty of Honesty*

Faith informs my performance as a judge in a fourth way, by teaching me to be honest. The moral duty of honesty requires both truthfulness in communication and reasoning and respect for the property of others. This duty is reflected in the commandments against bearing false witness and stealing, respectively.

Regarding the former, the *Catechism* has the following strong words about the necessity for truth in a judicial system:

When it is made publicly, a statement contrary to the truth takes on a particular gravity. In court it becomes false witness. When it is under oath, it is perjury. Acts such as these contribute to condemnation of the innocent, exoneration of the guilty, or the increased punishment of the accused. They gravely compromise the exercise of justice and the fairness of judicial decisions.<sup>45</sup>

That Catholic perspective echoes the most basic secular understanding of the judicial function, reflected in the first Canon of the Code of Conduct, which requires a judge to “uphold the integrity and independence of the judiciary.”<sup>46</sup> A judge must not only demand truthfulness from witnesses and attorneys; a judge must be truthful about the business of the judiciary. Litigants, attorneys, and the public have a right to just decisions and to know the reasons for the decisions of courts. This means judges must resolve controversies honestly and provide candid judicial opinions and orders.

The moral duty of honesty also extends, as I mentioned earlier, to the commandment against stealing, which requires respect for the property of others.<sup>47</sup> The *Catechism* explains that “any form of unjustly taking and keeping the property of others is against the seventh commandment.”<sup>48</sup> Among the unjust takings listed in the *Catechism* are “corruption in which one influences

42. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3.

43. *Id.* Canon 3A(5).

44. *Id.* Canon 3B(1).

45. CATECHISM OF THE CATHOLIC CHURCH ¶ 2476. (footnotes omitted).

46. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1.

47. CATECHISM OF THE CATHOLIC CHURCH ¶ 2408.

48. *Id.* ¶ 2409.

the judgment of those who must make decisions according to law,”<sup>49</sup> “appropriation and use for private purposes of the common goods of an enterprise,”<sup>50</sup> and even “work poorly done.”<sup>51</sup>

This moral duty of honesty in respect for the property of others is reflected in all of the Canons of the Code of Conduct for Judges that I have mentioned already: the first Canon, which requires judges to uphold the integrity of the judiciary, the second Canon, which requires judges to avoid impropriety, and the third Canon, which requires judges to perform the duties of the office impartially and diligently.<sup>52</sup> A judge must respect the property of the taxpayers that has been entrusted to the judiciary for the promotion of the common good. A judge not only has a duty to work, but an obligation to give the taxpayers honest and skilled work for the salary and benefits he receives, while avoiding conflicts of interest that would compromise the reputation and integrity of the judiciary.<sup>53</sup>

## II. HOW LAW, NOT RELIGION, MATTERS IN JUDGING

Although my religion properly informs and motivates me to be faithful to my oath of office and to my moral duties, to obey the government and its laws, and to work both diligently and honestly, there is a limit to the relevance of religion in the performance of my judicial duty. That limit is defined by the very nature of my judicial authority. Properly understood, the exercise of my authority as a federal judge is governed by the law alone, and that understanding is where the real controversy exists in the contemporary debate about judicial authority.

To explain my perspective of my judicial authority, I return to Professor Carter’s argument, in which he described two kinds of judges: First, “the objective judge;” and second, “the morally sensitive judge.”<sup>54</sup> I will use these models for judging to help explain my perspective.

Professor Carter described the objective judge, which embodies my model for judging, in these terms:

The objective judge considers adjudication an exercise of interpretation, that is, the application to a text of a set of interpretive rules. The objective judge believes that the legal community of which she is a part shares a consensus on the interpretive rules that judges are to apply. Her vision of her role is to discover the rules and to try to apply them to the cases that come before her. These interpretive rules are supposed to yield relatively determinate results, which is another way of saying that the result of the interpretation should not depend in any significant way on the

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49. *Id.*

50. *Id.*

51. *Id.*

52. CODE OF CONDUCT FOR UNITED STATES JUDGES Canons 1-3.

53. *Id.* Canon 3C.

54. Carter, *supra* note 15, at 933-35.

biases of the interpreter.<sup>55</sup>

Professor Carter's view of how judging works in reality is personified by the morally sensitive judge, who "engages quite self-consciously in a form of reasoning best described as moral philosophy. Indeed, there are cases in which, if there is to be a decision at all, a degree of reliance on moral conviction can scarcely be avoided, and might even be desirable."<sup>56</sup> When a federal judge decides issues of constitutional law, Professor Carter said, "whether the judge claims to be enforcing the community's moral norms or updating the moral vision of the Founders, it is quite evident that the judge cannot make such decisions without relying, at least in part, on her own moral knowledge."<sup>57</sup>

To be fair, Professor Carter confessed that he was "sometimes wistful"<sup>58</sup> for the objective method of judging, but he asserted that "there appears to be a widely shared expectation that judges will sometimes rely on personal moral knowledge."<sup>59</sup> Professor Carter also admitted that "the ghost of the objective judge refuses to go away. . . . [O]nce a judge's moral understanding is permitted to play a role, the liberal argument cannot distinguish religiously based knowledge from other moral knowledge . . . ."<sup>60</sup> For that reason, he concluded, "[t]he aspirational model of the objective judge might offer the only path to sanity."<sup>61</sup>

If I adhered to the model of the morally sensitive judge, then I would find it difficult to argue against Professor Carter that a judge should not be permitted to rely on his religion as a source of authority in reaching decisions. Because of that difficulty, I agree with Professor Carter that the model of the objective judge offers a path to sanity in the sense that every citizen—believers of all faiths and atheists alike—should expect their legal controversies to be resolved by fair rules adopted in advance by elected authorities. My disagreement with Professor Carter is with his view that the objective judge is fictitious.

It is amusing to me that, although many law professors argue that the model of the morally sensitive judge explains how judging actually works, many judges, who, of course, actually perform that work, disagree with that model. Three years after Professor Carter delivered his lecture at Notre Dame, for example, Judge James Buckley of the District of Columbia Circuit published an essay entitled *The Catholic Public Servant*,<sup>62</sup> in which he explained that "a judge's task [is] to discern the governing legal principles as objectively as he

55. *Id.* at 934.

56. *Id.* at 935 (footnote omitted).

57. *Id.*

58. *Id.* at 934.

59. *Id.* at 935.

60. Carter, *supra* note 15, at 944.

61. *Id.*

62. James L. Buckley, *The Catholic Public Servant*, 20 FIRST THINGS 18 (1992), available at <http://www.firstthings.com/ftissues/ft9202/articles/buckley.html>.

can, and then to apply them.”<sup>63</sup> Judge Buckley argued that a judge’s job “is to give force and effect to the law, whether he agrees with it or not; and that is responsibility enough.”<sup>64</sup> Judge Buckley even went one step further, arguing that “the justice I am sworn to administer is not justice as I might see it, but justice as defined by the Constitution and legal traditions of the United States. And if I consciously deviate from that body of law to do justice as I see it, I violate my oath of office . . . .”<sup>65</sup> I agree with Judge Buckley. The objective method of judging is more than alive and well; it is the only legitimate model for a federal judge.

The duty of a federal judge is unlike that of a legislator or executive. Alexander Hamilton eloquently provided the following classic exposition of the judicial role in Federalist 78:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>66</sup>

As a judge, I am not given the authority to use a personal moral perspective to update or alter the text of our Constitution and laws. The business of using moral judgment to change the law is reserved to the political branches, which is why the officers of those branches are regularly elected by the people. A judge’s task is limited to serving as an umpire, so that controversies between citizens and officers of their government may be resolved based on the law. For that limited task, a federal judge is granted a privilege designed to secure his independence: life tenure with no reduction in salary.

An officer of a political branch, such as Congress, is free to propose changes in the law that conform with his perspective of morality, as informed by his religion. For centuries, members of Congress have supported a variety of new laws on this kind of basis, whether to abolish slavery, withdraw troops from foreign wars, abolish child labor, guarantee civil rights, provide assistance to the poor and sick, protect marriage, or prohibit the sale of intoxicating liquors. The changing of laws enacted by political authorities is not a judge’s task; the duty of a judge is the application of those laws in controversies within

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63. *Id.*

64. *Id.*

65. *Id.*

66. THE FEDERALIST No. 78 (Alexander Hamilton).

the jurisdiction of the courts.

Adherence to the model of objective judging does not mean that the task of judging is either mechanical or easy. The meaning and application of the law is sometimes difficult to discern, which is why judges in good faith sometimes disagree. The duty to administer justice requires the exercise of judgment, but not the employment of religious doctrine as a source of authority to supplant or evade the law when judging becomes difficult or its outcome undesirable. A judge who is motivated by moral duties to fulfill his oath and obey the law must strive to be as objective as possible using traditional methods of construction, reliance on precedent, and legal reasoning.

The Church makes no claim that judges must be moral philosophers who are empowered to change the law, as they see fit, in resolving cases. As the *Catechism* states, “[t]he Church invites political authorities to measure their judgments and decisions against . . . inspired truth about God and man,”<sup>67</sup> but that statement is not a command that justice be administered by a court contrary to positive law. In our system, the political authorities who measure the need for changes to our Constitution and laws, based on the truth about God and man, are the officers of the legislative and executive branches.

But what if the law of the sovereign conflicts with the natural law? Does not the Catholic Church, based on the reasoning of St. Augustine and St. Thomas Aquinas, teach that a violation of natural law cannot be called properly “law”?<sup>68</sup> My answer is that a federal judge has no authority to use natural law as a way to subvert the clear commands of the positive law.<sup>69</sup>

### III. WHEN FAITH AND LAW CONFLICT

Although the objective judge provides the proper model for my work, objective judging does not allow me to ignore the moral consequences of my work. As Judge Buckley wrote, “[a] judge, of course, is no more relieved of moral responsibility for his work than anyone else in either private or public life.”<sup>70</sup> The *Catechism* explains, “[f]reedom makes man a moral subject. When he acts deliberately, man is, so to speak, the *father of his acts*. Human acts, that is, acts that are freely chosen in consequence of a judgment of conscience, can be morally evaluated. They are either good or evil.”<sup>71</sup>

That brings me to my final topic: What happens when my judicial duty and my moral duty, as informed by my religion, conflict? I will first address in what

67. CATECHISM OF THE CATHOLIC CHURCH ¶ 2244.

68. See Levinson, *supra* note 16, at 1074.

69. *Id.* at 1075-76 n.85 (quoting a letter from Professor Robert George of Princeton University regarding Justice Scalia’s view that “his duty as a judge is to determine the meaning of the positive law and render judgment accordingly”).

70. Buckley, *supra* note 62, at 2.

71. CATECHISM OF THE CATHOLIC CHURCH ¶ 1749.

kinds of circumstances there would be a conflict of judicial and moral duties, and I will then address the proper response to that conflict. Fortunately, there is a rich body of Catholic teaching available to assist a judge in identifying a conflict,<sup>72</sup> and there is a simple remedy in law for judges to avoid the conflict after it has been identified.

When does the performance of a judicial act become morally unacceptable? The answer is rarely. Ordinarily the immoral act of a party does not make the judge assigned to his case responsible for that immoral act. The *Catechism* teaches that “[t]he morality of human acts depends on: [1] the object chosen; [2] the end in view or the intention; [and] [3] the circumstances of the action.”<sup>73</sup> Furthermore, “[a] *morally good* act requires the goodness of the object, of the end, and of the circumstances together. An evil end corrupts the action, even if the object is good in itself (such as praying and fasting ‘in order to be seen by men’).”<sup>74</sup> Conversely, “[a] good intention . . . does not make behavior that is intrinsically disordered . . . good or just. The end does not justify the means.”<sup>75</sup>

Two kinds of cooperation with evil must be avoided. The first is called formal cooperation, which occurs when the cooperator shares the evil intent of the actor.<sup>76</sup> Formal cooperation with evil is always morally wrong,<sup>77</sup> but it is an unlikely problem for a judge who must apply the law impartially—that is, without adopting, as the judge’s own end, the object sought by a party who seeks relief from a court.

The other (and, for a judge, more likely) kind of cooperation with evil is called material cooperation. Material cooperation occurs when the cooperator assists the actor by performing an act that is not necessarily evil.<sup>78</sup> Whether material cooperation is morally acceptable depends on whether there is a sound reason for the cooperation (such as avoiding a worse harm), whether the cooperation is remote or proximate, and whether the cooperator avoids the danger of scandal.<sup>79</sup> The graver the evil, then the more serious the reason for cooperation must be to be justifiable.

Two of these conditions for material cooperation are ordinarily satisfied in the performance of judicial work. First, a judge has more than a good reason to apply the law impartially in every case, because the performance of that duty in a constitutional republic is a fundamental safeguard for the protection of human liberty. The resources of the judiciary are also scarce, so a judge is ordinarily

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72. See 3 GERMAIN GRISEZ, *THE WAY OF THE LORD JESUS: DIFFICULT MORAL QUESTIONS* 871-97 (1997).

73. CATECHISM OF THE CATHOLIC CHURCH ¶ 1750.

74. *Id.* ¶ 1755.

75. *Id.* ¶ 1753.

76. 3 GRISEZ, *supra* note 72, at 873.

77. *Id.*

78. *Id.*

79. *Id.* at 876-89.

obliged to perform his share of the work of the judiciary. Second, the performance of the judicial function is likely to be remote from the intended evil act of the party before the court; the typical scenario is where the judge determines that the law does not empower the government to interfere with a third party's choice to commit an immoral act.

A judge needs to be attentive to the third condition for acceptable material cooperation: avoiding scandal, which the *Catechism* defines as "an attitude or behavior which leads another to do evil."<sup>80</sup> The *Catechism* explains that "[a]nyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged."<sup>81</sup> The *Catechism* also states that "[s]candal can be provoked by laws or institutions, by fashion or opinion."<sup>82</sup> For judges and lawyers there is a special danger of scandal, because "[s]candal is grave when given by those who by nature or office are obliged to teach and educate others."<sup>83</sup>

There are some circumstances of material cooperation that raise serious issues of proximity and potential scandal. A Catholic trial judge in a state court who must decide whether to sentence a murderer to death or grant permission for a minor to have an abortion would have to consider whether he is proximately cooperating with an evil act and avoiding scandal; however, a federal judge is less likely to face this kind of proximity or potential scandal. Catholic legal scholars have concluded, for example, that a federal appellate judge does not either proximately cooperate with a potential evil or cause scandal when he upholds a death sentence: "To affirm a sentence is not to approve it, but to say that the trial court did its job."<sup>84</sup>

The more likely scenario for a federal judge is that his cooperation with the evil act of another will be remote, dictated by law, and faithful to a duty that more often protects our freedom in a noble and necessary manner. Allow me an example outside of the judicial realm: A mail carrier respects the rules of privacy and prompt delivery for get well cards, boxes of Holy Bibles, and lifesaving medications, while following the same rules for delivering pornography. A judge similarly applies the law impartially in a variety of cases in which the law protects the poor, victims of wrongdoing, the integrity of the family, and religious freedom, and the judge respects the law when it does not empower him to prevent a third party from committing an immoral act.

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80. CATECHISM OF THE CATHOLIC CHURCH ¶ 2284.

81. *Id.* ¶ 2287.

82. *Id.* ¶ 2286.

83. *Id.* ¶ 2285.

84. John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 328 (1998); see also Stephen F. Smith, *Cultural Change and "Catholic Lawyers,"* 1 AVE MARIA L. REV. 31, 44 (2003).

Pope John Paul II created a stir in January 2002 when he said in an address to a Church marriage tribunal that “professionals in the field of civil law should avoid being personally involved in anything that might imply a cooperation with divorce,”<sup>85</sup> but the Holy Father recognized, in even this context, that judges differ from lawyers. He explained, “for judges, this may prove difficult, since the legal order does not recognize a conscientious objection to exempt them from giving sentence. For grave and proportionate motives they may therefore act in accord with the traditional principles of material cooperation.”<sup>86</sup>

Although the teaching of the Church about material cooperation makes it unlikely that a federal judge will proximately cooperate with evil or cause scandal, there is a simple remedy when that rare problem arises. The judge should recuse himself. If the judge cannot perform his legal duty, without violating his moral duty, then the judge must honor both duties by recusal. The judge honors the law by refusing to disobey it, as that would violate his oath, and the judge honors his faith by avoiding cooperation with evil, as that would violate his conscience. The judge cannot be impartial to his moral duty, and Canon 3 requires a judge to “disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”<sup>87</sup> The law acknowledges that judges, in rare cases, should step aside.

#### CONCLUSION

Although I will not offer an opinion about the recent incidents involving Catholics nominated to federal judgeships, Catholics should welcome a conversation about the religious faith of federal judges. We are having this conversation because Catholics are increasingly being asked to serve in positions of trust in the American government. We have moved beyond the harsh expressions of bigotry when Al Smith was nominated to be President and the debate that arose when John F. Kennedy was so elected. We are no longer speaking of a single Catholic seat on the Supreme Court, as we were when President Eisenhower nominated William Brennan to serve as an associate justice.

We are having this conversation because many Americans recognize that Catholics are called to take seriously the teachings of the Church; hopefully, that recognition is based upon the examples of an engaged, informed, and faithful laity. That recognition is undoubtedly influenced by the recent decades of evangelism of the late Pope John Paul II, and his fulfillment of the Second

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85. Pope John Paul II, Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota (Jan. 28, 2002), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/2002/january/documents/hf\\_jp-ii\\_spe\\_20020128\\_roman-rot\\_a\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rot_a_en.html) (alterations in original) (emphasis omitted).

86. *Id.* (alterations in original) (emphasis omitted).

87. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3.

Vatican Council. It is refreshing to hear Americans ask whether Catholicism makes a difference in the lives of its adherents, because there is a positive answer.

As anti-Catholicism still persists in parts of American culture, this latest controversy about Catholic Americans presents a splendid opportunity to be witnesses for both the Gospel and our allegiance to the Constitution. This *kairos* calls Catholics to advance the work of Father John Courtney Murray, an American Jesuit theologian whose 1960 book, *We Hold These Truths*,<sup>88</sup> explained and celebrated the Catholic commitment to the American Proposition. Father Murray explained,

Catholic participation in the American consensus has been full and free, unreserved and unembarrassed, because the contents of this consensus — the ethical and political principles drawn from the tradition of natural law — approve themselves to the Catholic intelligence and conscience. Where this kind of language is talked, the Catholic joins the conversation with complete ease. It is his language. The ideas expressed are native to his own universe of discourse.<sup>89</sup>

This conversation also gives Catholics the opportunity to remind our fellow Americans about the first principles of the founding of our Republic. As Father Murray wrote,

Part of the inner architecture of the American ideal of freedom has been the profound conviction that only a virtuous people can be free. It is not an American belief that free government is inevitable, only that it is possible, and that its possibility can be realized only when the people as a whole are inwardly governed by the recognized imperatives of the universal moral law.

... In this sense democracy is more than a political experiment; it is a spiritual and moral enterprise.<sup>90</sup> And its success depends upon the virtue of the people who undertake it.

Catholic judges are friends of the Constitution. We are loyal to its promises and protections. It is our privilege to fulfill our oaths to support and defend the Constitution of the United States.

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88. JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* (Rowman & Littlefield 2005) (1960).

89. *Id.* at 55.

90. *Id.* at 50-51.