University of Dayton Law Review

Volume 29
Number 2 *Gilvary Symposium: Evolving Standards of Decency in 2003: Is the Death Penalty on Life Support?*

Article 7

12-1-2003

Conscience of a Catholic Judge

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I. INTRODUCTION

I propose to you a moral dilemma: Can one be both a good Catholic and a good judge if one's judging involves the death penalty? Does Church teaching require a good Catholic to oppose in every instance execution of convicted murderers? Does a judge's oath of office require the judge to ignore Church teachings on the death penalty as he or she decides capital cases?

II. PERSONAL INVOLVEMENT WITH THE DEATH PENALTY

The dilemma is not academic for me, but personal. As a United States Magistrate Judge, I am part of the "machinery of death."[1] Every capital *habeas corpus* petition filed in the federal courts in Dayton and Cincinnati, Ohio, is referred to me for a recommended decision. And there are many. Hamilton County, Ohio, is among the top ten counties in America in the production of death sentences.[2]

I asked for this assignment. After handling the Dayton capital cases for a number of years, I asked to be assigned the Cincinnati cases as well so that the work of our court on these cases could be better coordinated, consistent, and coherent. My three law clerks and I have completed work on five of these cases and presently have twenty-seven more pending.

I am also a practicing Roman Catholic and have been all of my life. I struggle to be a "good" Catholic, a faithful participant in the tradition. By my understanding, being in the tradition requires hard work to (1) understand what the tradition has to say, and (2) make it alive by applying it to the world in which I live.[3]

At least in the last several centuries, the Catholic Church has spoken through its bishops and moral theologians to its own members and to the world at large on a vast array of social questions: What movies should you watch? What labor union should you join? Is socialism an acceptable

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[1] *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting and announcing that he would no longer "tinker with the machinery of death").

[2] James S. Liebman & Jeffrey Fagan, *A Broken System, Part II: Why There is So Much Error in Capital Cases and What Can Be Done About It*, http://justice.policy.net/cjedfund/dpstudy/liebman2.pdf (accessed Feb. 13, 2004).

[3] For an extended discussion of what it means to be faithful to the tradition, *see* Terrance W. Tilley, *Inventing Catholic Tradition* (Orbis Books 2000).

economic system? May you use "artificial" contraceptives? Should developed countries give aid to the underdeveloped? Is it moral to stockpile nuclear weapons? Is assisted suicide permissible?

III. WHAT DOES THE CATHOLIC CHURCH HAVE TO SAY ABOUT THE DEATH PENALTY?

Traditionally, the Catholic Church is thought of as opposing abortion and euthanasia but supporting capital punishment.[4] During the 1980's, Joseph Cardinal Bernardin promoted a new way of thinking about these issues that he believed was more appropriate. His thesis, referred to as the consistent ethic of life or the "seamless garment," suggested that Catholic moral thinking on life issues would have more coherence, acceptance, and influence on human behavior, if it taught that all life was precious: That of the unborn, that of the dying, and that of the convicted prisoner.[5] With respect to capital punishment, he noted:

> [I]n the case of capital punishment, there has been a shift at the level of pastoral practice. While not denying the classical position, found in the writing of Thomas Aquinas and other authors, that the state has the right to employ capital punishment, the action of Catholic bishops and Popes Paul VI and John Paul II has been directed against the exercise of that right by the state. The argument has been that more humane methods of defending the society exist and should be used. Such humanitarian concern lies behind the policy position of the National Conference of Catholic Bishops against capital punishment, the opposition expressed by individual bishops in their home states against reinstating the death penalty, and the extraordinary interventions of Pope John Paul II and the Florida bishops seeking to prevent the execution in Florida last week.[6]

The logic of Cardinal Bernardin's position was adopted by Pope John

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[4] *See* Bernard Haring, *The Law of Christ, Vol. III* at 122-23, (The Newman Press 1966). For an extended critical treatment of the tradition, *see also* James J. Megivern, *The Death Penalty: An Historical and Theological Survey* (Paulist Press 1997).

[5] Joseph Cardinal Bernardin, Gannon Lecture, *A Consistent Ethic of Life: An American-Catholic Dialogue* (Dec. 6, 1983) (in Joseph Cardinal Bernardin, *A Moral Vision for America* 7-16 (Georgetown University Press 1998)).

[6] *Id.* at 11 (referencing the execution of Robert Sullivan, Nov. 30, 1983).

Paul II in his encyclical *Evangelium Vitae*.[7] Of the death penalty, he wrote:

> This is the context in which to place the problem of the *death penalty*. On this matter there is a growing tendency, both in the Church and in civil society, to demand that it be applied in a very limited way or even that it be abolished completely. The problem must be viewed in the context of a system of penal justice ever more in line with human dignity and thus, in the end, with God's plan for man and society. The primary purpose of the punishment which society inflicts is "to redress the disorder caused by the offence." Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime, as a condition for the offender to regain the exercise of his or her freedom. In this way authority also fulfils the purpose of defending public order and ensuring people's safety, while at the same time offering the offender an incentive and help to change his or her behaviour and be rehabilitated.
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> It is clear that, for theses purposes to be achieved, *the nature and extent of the punishment* must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.[8]

IV. APPLYING CHURCH TEACHING TO MY INVOLVEMENT WITH THE DEATH PENALTY

Evangelium Vitae was published in 1995 about the time I was assigned my first capital case, the Hamilton County conviction of William Zuern for stabbing a deputy sheriff to death with a "shiv" made from a bucket handle while in jail for another murder. Mr. Zuern was convicted in 1984, but his case did not reach federal court until 1992. In 1995, however, District Court Judge Walter Rice decided to refer the *Zuern* case and all future death penalty cases to Dayton.

Although I had a good deal of *habeas corpus* experience, I had avoided

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[7] Pope John Paul did not refer to Cardinal Bernardin in the *Evangelium Vitae*. Pope John Paul II, Lecture, *Evangelium Vitae*, (Mar. 25, 1995), in Pope John Paul II, *The Gospel of Life* (*Evangelium Vitae*) (Times Books 1995).

[8] *Id.* at ¶ 56.

learning anything about the death penalty. I had never done criminal work as a private lawyer, except in representing Selective Service clients seeking conscientious objector status. As a Judge of the Dayton Municipal Court for seven years, I never saw a capital arrest. And for the first eleven years of my federal experience, I also had no contact whatsoever with capital charges. So I avoided reading capital cases or law review articles about the death penalty. They were always long, always contentious, and about an area of the law I thought I would never need to know as a judge.

As a citizen, I continued to adhere in a somewhat inchoate and unreflective way to what I had learned as a Catholic growing up: it was necessary to have the death penalty to adequately redress the injustice done by aggravated murder; no lesser penalty adequately addressed the grave tear in the social order made when innocent life was taken.

When I was assigned the *Zuern* case, I quickly realized I could no longer leave the debate on the morality of the death penalty to one side. Certainly, I would have to learn the immense technicalities of death penalty *habeas corpus* jurisprudence. But if I was going to be part of the "machinery of death,"[9] I knew I would have to make up my mind and form my conscience on this moral question. Could I "in good conscience" sign a report that recommended denying the writ of *habeas corpus* and therefore sending a man to his death at the hands of the state?

I was raised as a Catholic to understand that formation of conscience required study of the tradition and deep reflection on the ethical dilemmas in which one found oneself. Mere intuitive or instinctive reaction to a situation was insufficient, because human judgment is easily led astray by bias or desire. Mere deference to authority, even papal authority, was insufficient, because the natural law was man's rational participation in God's eternal law,[10] and one must think, not just defer, to be fully rational. And all of one's acts are subject to the judgment of conscience. Although a judge may have special moral obligations because of his or her social role as a judge, he or she is not exempted by that role from the demands of conscience.

I had read *Dead Man Walking* in 1994, the year before I was assigned the *Zuern* case.[11] Sister Helen Prejean makes it clear in the book –

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[9] *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting).

[10] Saint Thomas Aquinas, *Summa Theologica*, Pt. I-II, Q. 91, art. 2 (Robert Maynard Hutchins, Fathers of the English Dominican Province vol. II, (Daniel J. Sullivan trans., Ency. Britannica 1952)).

[11] Sister Helen Prejean, C.S.J., *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* (Random House 1993). I cannot remember why I read the book at a time when I was not generally engaged with death penalty issues. I believe it was recommended to me by Sr. Joan Hartlaub, a good friend who was campus minister at Sinclair Community College in Dayton and a member of Sr. Prejean's religious community, the Sisters of St. Joseph of Medaille.

published two years before *Evangelium Vitae* – that she was not speaking *from* the Catholic tradition, but *against* it. She noted:

> The swath of violence cut by Christians across the centuries is long and wide and bloodstained: inquisitions, crusades, witch burnings, persecutions of Jewish "Christ-killers." Now, in the last decade of the twentieth century, U.S. government officials kill citizens with dispatch with scarcely a murmur of resistance from the Christian citizenry. In fact, surveys of public opinion show that those who profess Christianity tend to favor capital punishment slightly more than the overall population – Catholics more than Protestants. True, in recent years, leadership bodies of most Christian denominations have issued formal statements denouncing the death penalty, but generally that opposition has yet to be translated into aggressive pastoral initiatives to educate clergy and membership on capital punishment. And the U.S. Catholic Bishops in their "Statement on Capital Punishment," while strongly condemning the death penalty because of the "unfair and discriminatory" manner in which it is imposed, its continuance of the "cycle of violence," and its fundamental disregard for the "unique worth and dignity of each person," nevertheless uphold the "right" of the state to kill. But if we are to have a society, which protects its citizens from torture and murder, then torture and murder must be off-limits to *everyone*. No one, for any reason, may be permitted to torture and kill – and that includes government.[12]

In other words, Sr. Prejean was then what she remains today, an unremitting abolitionist. Her position is that the death penalty must be abolished because the state does not have the right to kill in any case.

It seemed to me then, as it does now, that a Catholic judge who was persuaded to Sr. Prejean's position, could not morally participate in death penalty cases. If it is always wrong to execute someone, then a judge who agrees to have the execution carried out has cooperated in depriving the executed person of his or her rights.

On the other hand, if a judge decided in advance that he or she could never allow the death penalty in any case, the judge would be disqualified under the Code of Judicial Conduct from sitting in capital cases.[13] A judge is bound by his or her oath of office to enforce the law in every case. Since the law permits capital punishment, a judge who could not follow the law

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[12] *Id.* at 123-24.

[13] Richard B. Saphire, *Religion and Recusal*, 81 Marq. L. Rev. 351, 355 (1998). I am indebted to Professor Saphire for bringing this article to my attention.

and authorize any execution would be bound to step aside in all capital cases. So far as I know, that argument was never made to disqualify Justices Brennan, Marshall, or Blackmun from sitting in capital cases after they adopted an abolitionist position, but you can be sure that it would be made – and properly made – as to a lower court judge who had candidly admitted he or she held that position.[14]

The duty of a judge to follow the law is not only an ethical, but also a moral obligation, for the oath of office imposes a strong moral duty.[15] At the very least, a judge who believes that no one may morally be executed must be candid about his or her views. It would be unethical and immoral for an abolitionist judge to decide capital cases in a subversive way, as Justice Scalia has commented.

Some Catholics may believe *Evangelium Vitae* adopts the same abolitionist viewpoint that Sr. Prejean so eloquently advocates. Some abolitionists may promote that belief. Indeed, Sr. Prejean herself has done so, criticizing Catholic governors for not commuting death sentences in her remarks at the keynote address for the Gilvary Symposium.[16]

Over the years there has been a strong tendency by advocates of different sides on various social questions to over-read encyclicals in support of their positions. In the early 1960's, William F. Buckley, Jr., became involved in public controversy with the Jesuit editors of America magazine over Pope John XXIII's social encyclical, *Mater et Magistra*. The Jesuits accused Buckley of not being a good Catholic because he did not accept every jot and tittle of the encyclical as irreformable doctrine. Out of that controversy came Garry Wills' *Politics and Catholic Freedom*, which points out the sometimes-subtle changes in Catholic social teaching, as embodied in the social encyclicals, from Leo XIII to John XXIII.[17] For example, Leo championed the right of working men to join unions, but only if they were Catholic unions; any such limitation had disappeared long before Pope John's election. Wills notes that the popes' desire to speak to current issues with the best judgment they can bring to bear at the time they speak would be completely stymied if every word and every possible

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[14] *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (stating that "[u]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be").

[15] Robert Bolt, *A Man For All Seasons* 140 (Vintage Books 1990). "What is an oath then but words we say to God? . . . When a man takes an oath, Meg, he's holding his own self in his own hands. Like water. And if he opens his fingers *then* – he needn't hope to find himself again." Thomas More to his daughter Margaret Roper. *Id.*

[16] Sister Helen Prejean, Speech, *Gilvary Symposium* (University of Dayton School of Law, Dayton, Ohio, Sept. 25, 2003) (copy on file with *University of Dayton Law Review*).

[17] Garry Wills, *Politics and Catholic Freedom* (Henry Regnery Company 1964).

implication of every word were taken as binding for all time.[18] The bottom line is that one cannot read every encyclical as if it were the gospel because it is not intended to be the gospel. *A fortiori*, one cannot promote to infallibility every inference one would like to draw from an encyclical in support of one's own political positions. Encyclicals must be read as Supreme Court opinions are read, in a nuanced contextual way.

V. MY CONCLUSIONS AS A CATHOLIC CITIZEN

I do not believe *Evangelium Vitae* requires every good Catholic to be an abolitionist in Sr. Prejean's sense. Avery Dulles at the Pew Forum colloquium on the death penalty, *A Call for Reckoning*, put the case for a more nuanced reading of the encyclical. Pope John Paul does not say that every execution in every historical setting is morally wrong. Instead, he argues that the principal purpose of criminal punishment must be to prevent further crime and that that goal is achievable, in modern industrial societies, without capital punishment because we can effectively imprison convicted murderers. In other words, in light of the value of human life, the right of the state to execute can be properly exercised only in cases of absolute necessity, which does not exist where there are effective prison systems. Moreover, doubts about the necessity of execution should be resolved in favor of life so as not to promote the "culture of death" which devalues the individual human life, has led to widespread abortion, and could lead to widespread euthanasia. If capital punishment is not wrong absolutely, in every instance, then there is room for statesmen, acting in good conscience, to disagree with the Pope's prudential judgment that it is not necessary in modern industrial societies.

This is not to say Sr. Prejean's and Pope John Paul's conclusions are wrong, just that they are not mandatory. You cannot be a good Catholic and deny the divinity of Christ. But you can be a good Catholic and continue to believe that some executions are justified.

My own conclusion as a citizen, however, after much thought and nearly a decade of experience is that *Evangelium Vitae* is right as a matter of policy. Let me give you my reasons.

First of all, Pope John Paul's reasons are good ones. The traditional justification of capital punishment – that it is necessary to redress the injustice of the murder of the innocent – is not working in our society. At the same time that capital punishment has been reenergized in our country

[18] Garry Wills, *In Papal Sin: The Structures of Deceit* (Image Books 2001), written forty years after *Politics and Catholic Freedom*, Wills criticizes popes for being too inflexible in interpreting their own prior words and those of their predecessors.

since 1976, we have also suffered a massive increase in abortions. If we were to teach ourselves that every human has an unalienable absolute right to life, might that not convince those who have a right to abortion not to exercise it? Might that not ward off the potential for extending the culture of death to euthanizing our dependent elderly?

But I have reasons in addition to the Pope's. The death penalty seriously skews allocation of criminal justice resources. It costs many times as much to execute a convicted murderer as it does to imprison him, for life if need be. But it also risks making celebrities of death row inmates in a bizarre way. When we litigated the John Byrd case in 2001, the Ohio Public Defender in person and four assistants represented Mr. Byrd at the evidentiary hearing. He was given a number of television interviews about his innocence claim, a claim he never took the stand to support by his own testimony. Giving him a hearing at all caused an acrimonious debate in the Sixth Circuit and the maneuvering that went on eventually led to a disciplinary complaint against the Chief Judge of the Circuit.

Contrast Byrd with his co-defendant John Brewer whose claim that he actually did the stabbing was the focus of our case. By the time the case came to me, Brewer had not had a lawyer to press any claims to relief he might have for well over ten years. He got only one direct appeal hearing, whereas Byrd had two direct appeals, a state court post-conviction proceeding, one full federal *habeas* proceeding, and two additional attempts at *habeas* relief. Because "death is different,"[19] capital cases get unusual amounts of attention at all levels of the court system and repeatedly divide even the Supreme Court acrimoniously.[20] Capital punishment has skewed all of *habeas corpus* jurisprudence; the desire to expedite executions led to the Antiterrorism and Effective Death Penalty Act of 1996, that beacon of statutory clarity,[21] which has occasioned endless opinion writing about its meaning.[22] Virtually all the capital defense attorneys I know are also abolitionists, and their intense hatred of the death penalty sometimes distorts their advocacy.[23]

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[19] *Woodson v. N.C.*, 428 U.S. 280, 305 (1976).

[20] *See* Edward Lazarus, *Closed Chambers* (Random House 1998); *see also Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting).

[21] *See Lindh v. Murphy*, 521 U.S. 320 (1997).

[22] *See e.g. Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc) (stating that 28 U.S.C. §2244(d)(2) (2004), which tolls the statute of limitations while a state collateral attack on a judgment is pending, applies during the ninety days after state review is completed when a petition for certiorari to the U.S. Supreme Court could be filed, even if no such petition is ever filed).

[23] John Byrd's lawyers repeatedly asserted to all of the involved Ohio courts, to the Sixth Circuit, and to our court that John Brewer had given two affidavits about the actual facts of the murder for which he and Byrd were convicted. In the course of the evidentiary hearing, it was discovered that there were at least five such affidavits, all of them in the possession of the Ohio Public Defender's Office,

If capital punishment worked to reduce innocent deaths, it might be worth the costs. But innocent life seems no more respected now than it did when executions were far fewer in the 1960's and 1970's. Violent crime is down, but that is probably because of changing ages of the population and increased incarceration of recidivists. I have not seen any proof that capital punishment has a significant deterrent effect on aggravated murder. There may have been times when swift and certain execution was a deterrent or at least a potent expression of the community's outrage at the killing of the innocent.[24] However, that is not now the case. Swift and certain execution is not possible in current American culture and jurisprudence.

But these are my views as a Catholic American citizen, partly formed by current papal teaching. What impact do they have – can they have – on my behavior as a federal judge?

VI. BUT WHAT ABOUT CATHOLIC JUDGES?

American political culture has often been inhospitable to Catholic social teaching. We were founded as a Protestant nation and many Americans have been profoundly suspicious of the Catholic hierarchy as a source of thought. In the mid-nineteenth century, Protestant theology became more liberal and therefore more individualist. As denominationalism became less important and all of the established churches disappeared, it became easier to identify the individualist spirit of Protestantism with the spirit of America. This spirit was threatened by Catholic immigration and many political and theological leaders struggled to prevent a takeover, as they saw it, of America by the pope. Philip Hamburger details this struggle in *Separation of Church and State*, especially in Chapter 8. He notes efforts to pass laws for public inspections of convents, for congregational ownership of church property, and even to make the Catholic hierarchy illegal.[25] The notion was that individual Catholics might be tolerable as long as they were loyal to the American civil religion, which implied foreswearing allegiance to the pope, a foreign prince.[26]

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containing a number of material inconsistencies on which Brewer could have been cross-examined if the affidavits had been disclosed before he left the witness stand. In another case, in attempting to avoid the clear holding of a recent Sixth Circuit opinion in which the court held a petitioner must sign a *habeas* petition, an Assistant Ohio Public Defender asserted in open court, "That was that case and this is this case."

[24] *See* Stuart Banner, *The Death Penalty: An American History* (Harvard U. Press 2002) (providing information on the typical times from arrest to execution at various periods during American history).

[25] Philip Hamburger, *Separation of Church and State* (Harvard U. Press 2002).

[26] Unlike any other church leader in the world, the pope remains today at least technically a sovereign over the Vatican City State. In the mid-19th century, of course, he was an actual sovereign

While political leaders no longer call on Catholic citizens to renounce the pope, it is different for Catholic judges. If America has a civil religion, federal judges are its priests. And before they can be ordained, they must renounce any un-American ideas, such as being too Catholic. No one of course cares whether a Catholic federal judge believes in transubstantiation or a more philosophically modern version of Real Presence. The concern is about separation of Church and State and how closely a Catholic judge will follow Church teaching on moral questions.

My proof for this thesis is in the confirmation hearings of two recent notable Catholic Supreme Court Justices, William Brennan in the 1950's and Antonin Scalia in the 1980's. Sanford Levinson, Professor of Law at the University of Texas, wrote, "I believe that [Supreme Court] Justices identified with Catholicism have been forced to proclaim the practical meaninglessness of that identification."[27] He noted that in 1957 during his confirmation hearings Justice Brennan was asked the following question, propounded by the National Liberal League:

> You are bound by your religion to follow the pronouncements of the Pope on all matters of faith and morals. There may be some controversies, which involve matters of faith and morals and also matters of law and justice. But in matters of law and justice, you are bound by your oath to follow not papal decrees and doctrines, but the laws and precedents of this Nation. If you should be faced with such a mixed issue, would you be able to follow the requirements of your oath or would you be bound by your religious obligations?[28]

Justice Brennan answered that he was obliged by the oath to put the Constitution of the United States first and that he had no religious obligation superior to that. In 1977, on the thirtieth anniversary of his appointment, Brennan gave an even stronger response. He said that as a private citizen he would do what a Roman Catholic does, but to the extent of any conflict with the Constitution, "my religious beliefs have to give way."[29]

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over a substantial portion of Italy. Some of the most anti-liberal papal writing of the nineteenth century, *Mirari Vos* of Gregory XVI (1832) and *Quanta Cura* and the Syllabus of Errors of Blessed Pius IX (1864), were written to defend that position. Hamburger notes that *Mirari Vos* began a "profoundly significant shift in attitude" on the part of Protestant clergy toward separation of church and state. *Id.* at 239-44.

[27] Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DePaul L. Rev. 1047, 1049 (1990).

[28] Sen. Jud. Comm., *Nomination of William Joseph Brennan, Jr.: Hearings Before the Committee on the Judiciary*, 85th Cong. 32-34 (Feb. 26-27, 1957); *Id.* at 1062.

[29] Levinson, *supra* n. 27, at 1063.

Justice Scalia was appointed in 1986. He had previously expressed doubts about *Roe v. Wade*.[30] He was asked by Senator Mathias, "What does a judge do about a very deeply held personal position, a personal moral conviction, which may be pertinent to a matter before the Court?"[31] He answered that there was a moral obligation, which arises from living in a democratic society that one should be bound by the determinations of that society or not be a judge.[32]

There is something fundamentally wrong with a process, supposedly in support of a pluralist society, which requires a candidate for judge to abjure any influence in his or her work from deeply held moral beliefs just because those beliefs are consonant with the judge's religion. James Gilvary, the jurist in whose memory this Symposium is conducted, faced the same pressure. Even though Common Pleas judges have little to do with abortion rights, Jim, as fine a candidate and judge as we have ever had in Montgomery County, was nearly denied the Democratic endorsement because his pro-choice credentials were in question.

While the First Amendment prohibits establishments of religion, Article VI of the Constitution prohibits any religious test as a qualification for federal public office.[33] What sort of public officials shall we have if we exclude all those who leave their morality, their consciences, at the door to their new federal offices?[34]

Of course we don't want "immoral" federal officials, we just want their morality not to be "dictated" by someone else. We want men and women who "make up their own minds," who stand on their own two feet like good Americans. I suggest that this view of how moral beliefs are formed embodies an unrealistic ideal. We learn our morality as we learn everything else – in community – or rather in overlapping and competing communities: the family, the neighborhood, the school, and the church. Catholic judges should not be asked to wall off their religious faith in considering questions of public morality, which are properly before them in cases.

Of course, these days American Protestantism has little to fear from

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[30] *Roe v. Wade*, 410 U.S. 113 (1973).

[31] Sen. Jud. Comm., *Nomination of Judge Antonin Scalia: Hearings Before the Committee on the Judiciary*, 99th Cong. 43-47 (Aug. 5-6, 1986).

[32] *Id.*

[33] *See* 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 Justices*, 39 DePaul L. Rev. 1107 (1990).

[34] "I believe, [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." Thomas More to Thomas Cardinal Wolsey in response to Wolsey's suggestion of "certain measures" to be taken against the Church to get Henry VIII a divorce from Catherine of Aragon. Bolt, *supra* n. 15, at 22.

any Catholic divergence from the common morality. If American Catholicism was ever monolithic in its beliefs or subject to control by the Vatican, those days are long since past. Indeed, appointing Presidents or confirming Senators who rely on a judge's religion as shorthand for his or her views are likely to be gravely disappointed. Note, for example, Justice Kennedy's position in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (re-affirming *Roe v. Wade*), and his majority opinion in *Lawrence v. Texas*, 123 S. Ct. 2472; 156 L. Ed. 2d 508 (2003) (holding that States may not criminalize consenting adult homosexual conduct).[35]

In any event, most Catholic social teaching purports to be based, not on some special papal revelation or interpretation of the Bible, but upon natural law thinking.[36] That is, it is based on reasoning about the nature of humankind and its inborn purposes, not on anything esoteric or peculiarly Catholic. Pope John Paul II's position on the death penalty does not depend on scripture or Catholic tradition, but upon openly accessible reasons, which can be debated and adopted or rejected by anyone. Given the importance of natural law thinking in our constitutional tradition, it would be strange, indeed perverse, to reject a candidate for a federal judgeship because he happened to think in natural law terms and happened to have learned that way of thinking in a Catholic educational institution.[37]

Whether inspired by his Catholic upbringing or not, Justice Brennan brought a strong natural law focus to his analysis of the death penalty. In summarizing his long-held public views against capital punishment, he wrote:

> The calculated killing of a human being by the state involves, by its very nature, an absolute denial of the executed person's humanity [because] an executed person has lost the very right to have rights, now or ever. . . . [T]he fatal constitutional infirmity of capital

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[35] Clerics who rely on a judge's denominational identification may also be badly disappointed. Cardinal Spellman lobbied Dwight Eisenhower for a Catholic Justice and got Brennan in 1957, much to his reported displeasure. In 1989 when Spalding University, a Catholic institution in Louisville, gave Justice Brennan an honorary degree, the Roman Catholic Archbishop publicly boycotted the ceremony. Levinson, *supra* n. 27, at 1066 (citing Legal Times, May 29, 1989, at 10). What positions of Justice Brennan was the Archbishop protesting?

[36] Note, however, that the wrong position on natural law thought can be detrimental to the health of one's nomination. In his commencement address at the University of Dayton School of Law in 1993, Judge James Ryan of the Sixth Circuit noted that Senators Biden and Kennedy had opposed Robert Bork's nomination because he was a positivist opposed to natural law thought. But they also opposed Clarence Thomas because he adhered to the "wrong kind" of natural law thinking. James Ryan, Speech, *Commencement Address* (University of Dayton School of Law, Dayton, Ohio, May, 1993).

[37] See Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Cornell U. Press Ithaca 1957).

> punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded.[38]

In his concurrence in *Furman v. Georgia*,[39] he had rejected an historical – i.e., positivist or originalist – interpretation of the Cruel and Unusual Punishment Clause, arguing the Framers had deliberately left future interpretation to the moral intuitions of future judges. *Furman* has no quotations from papal encyclicals, but the argument is completely parallel to that made by Pope John Paul in *Evangelium Vitae*.

Justice Scalia, of course, is well known to reject any natural-law-based interpretations of the Constitution because he believes judges are not authorized to use such approaches. The Constitution means what it meant to those who framed it and judges have no warrant to use broad phrases to correct what they see as injustices of their times. When he appeared at *A Call for Reckoning*, he declined to say whether he agreed or disagreed with the death penalty as a matter of policy because he felt required to be judicially neutral on the question. He also stated that, to the extent *Evangelium Vitae* and the new Catholic Catechism declared the death penalty to be immoral, he disagreed with them, noting that he could not continue to be a part of the "machinery of death" if he concluded it was immoral. He noted his pleasure that *Evangelium Vitae* did not represent *ex cathedra* teaching, because he felt that would disqualify Catholics from holding public offices to which the death penalty was relevant. And he questioned strongly the advisability of combining "hard but traditional teaching on birth control and abortion" with this "new" position on the death penalty.[40]

Those who are abolitionists may prefer Justice Brennan's approach. He offers a way to bring the natural law thinking of *Evangelium Vitae* into the Constitution of the United States. By doing so, he offers a way to abolish the death penalty permanently, without the rancorous debates of state legislatures, without the inch-by-inch, case-by-case slogging which is our present lot.

Before we adopt Justice Brennan's approach, however, we should listen carefully to what Justice Scalia has to say. Natural law approaches in the hands of judges can be instruments of great power – one is tempted to say weapons of mass destruction. Brennan himself said, "With five votes, anything is possible."[41] The same natural law-substantive due process

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[38] William J. Brennan, *In Defense of Dissents*, 37 Hastings L.J. 427, 436 (1986).

[39] 408 U.S. 238 (1972).

[40] PewForum.org, *Transcript of Session Three: Religion, Politics, and the Death Penalty*, http://pewforum.org/deathpenalty/resources/transcript3.php3 (accessed Feb. 5, 2004).

[41] Lazarus, *supra* n. 20.

approach, which could have brought us abolition of the death penalty if Justice Brennan could have found three more votes, also brought us *Roe v. Wade* and *Lochner v. New York*, both strongly criticized for natural law approaches, which had been opposed by natural law approaches on the other side. Perhaps worst of all, natural law thinking brought us, at the hands of the first Catholic Justice, *Dred Scott v. Sanford*.[42] Roger Taney believed he could end the slavery problem by judicial fiat through the Due Process Clause and do so because the black man had no natural rights which the white man was bound to respect. Instead, he made it clear to the whole nation that the slavery problem could not be resolved by political compromise – because the courts could overrule political compromise – and instead would have to be settled by the bloodiest war of the nineteenth century.

VII. CONCLUSION: MY RESOLUTION OF THE DILEMMA

Although William Brennan, Joseph Bernardin, and Karol Wotjla are right on the morality of capital punishment, Antonin Scalia is right on the procedure. Because the prudential judgment about whether capital punishment remains necessary to defend innocent life is one about which reasonable, moral people can differ, whether we shall have it or not should be left to the mechanisms of democracy. Where the legislature has made a different judgment from the pope, a Catholic can still be a conscientious judge and participate in capital cases.

Nevertheless, the values which underlie *Evangelium Vitae*, are not debatable within the Catholic tradition. Innocent life is inviolable and the utmost must be done to protect the innocent from execution, no matter what important state interests might be served by such an execution. A Catholic judge is entitled to bring that paramount respect for the value of life from his or her Catholic tradition to capital cases, to insist that they be handled with the utmost seriousness and care and with the fullest measure of procedural due process, even when innocence is not in doubt. This course of conduct is consonant both with Catholic tradition and with a judge's oath to defend the Constitution.

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[42] 60 U.S. 393 (1857).