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ROMAN CATHOLICISM AND THE TEMPTATION OF *SHARI'A*

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Perhaps, even if I have misread his contributions to the present and immediately preceding issues of *Common Knowledge*, Alick Isaacs will not take it amiss if I say they have stimulated the appearance of this essay of mine in the same venue and context.¹ Our efforts have in common, first, that we both are Scots whose religion is not that of the state-recognized national Church of Scotland: Dr. Isaacs, as I understand it, is a modern Orthodox Jew, and I am a Roman Catholic. We share also, and more significantly, a discontent, as citizens of the post-Nuremberg world order, with elements of our respective orthodoxies—and I believe we share also a sense that the authorities of our religions, in reaction against modernity, have gone astray from their own longer-term traditional principles. Dr. Isaacs writes, in this milieu, on behalf of peace. It is my intention to write here, in a complementary fashion, on behalf of democracy, its institutions, and the exercise of individual conscience. For his part, Dr. Isaacs builds a case on foundational texts of the talmudic age—and in turning first to the Christian Gospels, so, in a sense, do I.

1. Alick Isaacs, "Lebanon II," *Common Knowledge* 15.1 (Winter 2009), 96–152; and, in the present issue of this journal, "The Humility of Hypocrisy: On the Irenic Illiberalism of Jewish Law."

Matters of Jurisdiction

In Luke 12:13 the following exchange is observed: “A man in the crowd said to Jesus, ‘Master, tell my brother to give me a share of our inheritance’. ‘My friend’, Jesus replied, ‘who appointed me your judge, or the arbiter of your claims?’” Thus, Jesus declines jurisdiction. He refuses to become involved in a dispute between brothers. He does not step in and seek to reconcile, or negotiate between, the parties to a family breakdown. He expresses no view on the merits of the complaint, on the justice of the claim of one brother over another. And Jesus avoids the task of adjudicating the matter, it would seem, because there are already existing mechanisms for the resolution of such disputes. There are extant regulations, lawyers to argue over them, and civil judges to apply them. This Gospel text might therefore be seen as an assertion or confirmation that the Christian tradition is one that is mindful of the distinction between the political and the religious spheres, and recognizes the autonomy of the state and the independence of civil law from religious law and the religious establishment. The text in Luke might also be interpreted as a warning to the church to avoid what may be called the temptation of *shari’a*—the temptation to make civil law mirror religious law.

My concern here is that the terms of pronouncements emanating from the Vatican and from individual bishops in recent years seem to indicate that the Catholic Church has given into this temptation. The particular documents that give rise to this concern include especially these: Pope John Paul II’s address to the Roman Rota, “Divorce and the Duties of Canon Lawyers and of Catholic Civil Lawyers and Judges” (2002); the Congregation for the Doctrine of the Faith’s doctrinal notes, “Some Questions regarding the Participation of Catholics in Political Life” (2002) and “Considerations regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons” (2003); Archbishop Raymond Burke’s essays “On Our Civic Responsibility for the Common Good” (2004) and “On the Discipline regarding the Denial of Holy Communion to Those Obstinate Persevering in Manifest Grave Sin” (2007). The second and third of these documents were prepared by the Congregation for the Doctrine of the Faith at the time when its head was Joseph Cardinal Ratzinger, now Pope Benedict XVI. It is understood that the present pope is these days engaged in writing an encyclical concerning the church’s teaching on “natural law” and its impact on matters of positive law and politics. Some indication of the direction of his thinking may, perhaps, be gleaned from the first encyclicals of his pontificate, *Deus Caritas Est: On Christian Love* and *Spe Salvi: On Christian Hope*, as well as from a number of his recent speeches to university, political, and general audiences: for example, his address of 2007 to the conference of the executive committee of the Centrist Democratic International, which is the international union of (primarily European and Latin American) Christian democratic par-

ties;² his message for the celebration of the World Day of Peace in 2008;³ and his address of 2008 written for—but, in the event, not delivered to—the faculty and students at La Sapienza University in Rome.⁴

It would be premature to anticipate the terms of any encyclical, so the discussion in this article of the thought of Joseph Ratzinger *as pope* is necessarily at this stage provisional. Going by his writings to date, however, he may be said to harbor a significant degree of pessimism in relation to the powers of human reason. He takes the view—citing Kant's judgment on the French Revolution—that reason is corrupted and that reason alone will tend to prefer evil (a "perverted end") rather than the good.⁵ In order to see the good, reason needs to be "purified" and shielded from the "dazzling effect of power *and special interests*."⁶ What shields and purifies reason (from such temptations as utilitarianism and pragmatism) is faith:⁷ faith in God, faith in Christ, and, ultimately, a faith in the church, which "liberates reason from its blind spots."⁸ The reasoning of the Roman Catholic Church on moral matters is said by Benedict XVI to form a particular, internally consistent discourse; still, he argues that the reasoning and conclusions of the church on matters of morality are, nonetheless, owed some deference within the wider society, because they embody the wisdom of the ages and a tradition of sustained ethical reflection over the course of two millennia.⁹

2. Available at www.vatican.va/holy_father/benedict_xvi/speeches/2007/september/documents/hf_ben-xvi_spe_20070921_idc_en.html (accessed September 21, 2008).

3. For the full text of this speech, see www.vatican.va/holy_father/benedict_xvi/messages/peace/documents/hf_ben-xvi_mes_20071208_xli-world-day-peace_en.html (accessed September 21, 2008).

4. For the full text of this speech, see www.vatican.va/holy_father/benedict_xvi/speeches/2008/january/documents/hf_ben-xvi_spe_20080117_la-sapienza_en.html (accessed September 21, 2008).

5. See the second encyclical of Benedict XVI, *Spe Salvi: On Christian Hope*, para. 19, www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20071130_spe-salvi_en.html (accessed September 21, 2008).

6. Pope Benedict XVI, *Deus Caritas Est: On Christian Love*, para. 28(a), www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html (accessed September 21, 2008).

7. See the September 2007 address of Pope Benedict XVI to participants in the conference of the executive committee of the Centrist Democratic International, www.vatican.va/holy_father/benedict_xvi/speeches/2007/

september/documents/hf_ben-xvi_spe_20070921_idc_en.html (accessed September 21, 2008).

8. Pope Benedict XVI, *Deus Caritas Est*, para. 28(a): "Here politics and faith meet. Faith . . . is also a purifying force for reason itself. From God's standpoint, faith liberates reason from its blind spots and therefore helps it to be ever more fully itself. Faith enables reason to do its work more effectively and to see its proper object more clearly. This is where Catholic social doctrine has its place: it has no intention of giving the Church power over the State. Even less is it an attempt to impose on those who do not share the faith ways of thinking and modes of conduct proper to faith. Its aim is simply to help purify reason and to contribute, here and now, to the acknowledgment and attainment of what is just."

9. In his speech to La Sapienza University (January 17, 2008), Pope Benedict XVI observed: "The Pope speaks as the representative of a community of believers in which a particular wisdom about life has evolved in the course of the centuries of its existence. He speaks as the representative of a community that preserves within itself a treasury of ethical knowledge and experience important for all humanity: in this sense, *he speaks as the representative of a form of ethical reasoning*" (www.vatican.va/holy_father/benedict_xvi/speeches/2008/january/documents/hf_ben-xvi_spe_20080117_la-sapienza_en.html [accessed September 21, 2008]).

For Benedict XVI, a society that fails to follow or rejects the church's ethical strictures, preferring the lights of its own reasoning unaided by faith and tradition, is plainly doomed.¹⁰ It will not achieve the goal of a well-ordered and just polity but, instead, will revert to the condition of a robber band, a Mafia society in which there is no honor or justice.

It is not yet clear whether these various remarks of Benedict XVI portend an innovation of some kind, or a rejection of the Thomist tradition of natural law, or a reformulation of the natural law tradition along what would be for him more congenially Platonist (rather than Aristotelian) lines. Little express reference appears to be made in Joseph Ratzinger's writings to the Thomist tradition and, at times, he seems to regard the idea of natural law as a post-Reformation Protestant development rather than as part of the pre-Reformation Catholic appropriation of Aristotelian thought. Thus, Cardinal Ratzinger stated in remarks made just prior to his elevation to the papacy:

[Consequent upon the Reformation], it was necessary to elaborate a law, or at least a legal minimum, antecedent to dogma: *the sources of this law then had to lie, no longer in faith, but in nature and in human reason. Hugo Grotius, Samuel von Pufendorf and others developed the idea of natural law, which transcends the confessional boundaries of faith by establishing reason as the instrument whereby law can be posited in common.* Natural law has remained (especially in the Catholic Church) the key issue in dialogues with secular society and with other communities of faith in order to appeal to the reason we share in common and to seek the basis for a consensus about the ethical principles of law in a secular, pluralistic society. Unfortunately, *this instrument has become blunt. Accordingly I do not intend to appeal to it for support in this conversation.* The idea of natural law presupposed a concept of "nature" in which nature and reason overlap, since nature itself is rational. *With the victory of the theory of evolution this view of nature has capsized: nowadays we think that nature as such is not rational. . . .* One final element of the natural law that claimed (at least in the modern period) that it was ultimately a rational law has remained, namely human rights. These are incomprehensible without the presupposition that man *qua* man, thanks simply to his membership in the species *man*, is the subject of rights and that his being bears within itself values and norms that must be discovered—but not invented. Today, we ought perhaps to amplify the doctrine of human rights with *a doctrine of human obligations and human limitations.* This could help us to grasp anew the relevance of the question as to *whether* there might exist a rationality of nature and hence a rational law for man and for his existence in the world."¹¹

10. See Joseph Cardinal Ratzinger, "That which Holds the World Together: The Prepolitical Moral Foundations of a Free State," a talk given at the Catholic Academy of Bavaria in January 2004, reprinted in his *Europe Today and*

Tomorrow: Addressing the Fundamental Issues (San Francisco, CA: Ignatius Press, 2000), 80.

11. Ratzinger, "That which Holds the World Together," 75–76.

Doubtless, more will be revealed in the anticipated encyclical; but if, as some commentators are already suggesting, the already published views of Benedict XVI on law, nature, and the state involve effectively an abandonment of the Aristotelian-Thomist synthesis that has formed the basis of Catholic social teaching since the late nineteenth century, then a fundamental shift will have occurred in the self-understanding of the church in its relation to modern society and political order.¹² A position of positive dialogue with, and full participation within, society was heralded, after all, by the Second Vatican Council. My fear is that the alternative model to active engagement with modern society might be that of a “fortress church” that rallies to itself a “faithful remnant” while railing against the unredeemable forces of secularism, relativism, and corrupted reason outside. The implication for Catholics engaged in public life is that we all would become—as nineteenth-century popes saw themselves, in the face of Italian unification—prisoners of the Vatican.

Voting as Sinning

The role of Catholics in public life came to special prominence in the United States in 2004 as the result of pronouncements made by a number of American bishops. In January of that year, Raymond Burke—then bishop of La Crosse, Wisconsin—published a formal “canonical notification” in the diocesan newspaper, in which he stated that Catholic politicians, who in their work as legislators were deemed by the bishop to have shown “support” for abortion or the legalization of euthanasia, would not be admitted to communion within his diocese.¹³ Bishop Burke was subsequently installed as archbishop of St. Louis, Missouri, and in June 2008 he was appointed prefect of the Apostolic Signatura, the Vatican’s supreme court of canon law. Archbishop Burke specified that the Democratic Party’s nominee for president of the United States, Senator John Kerry, a practicing Catholic, would be refused communion and, moreover, that Catholics who voted for him should also be excluded until such time as they had confessed and repented their “sin” in voting for “a pro-choice politician.”¹⁴ Thus, a Catholic

12. See Patrick McKinley Brennan, “The Decreasing Ontological Density of the State in Catholic Social Doctrine,” working paper no. 2006–23, *Villanova Law Review* 52 (2007).

13. See Bishop Raymond L. Burke, “Catholics and Political Responsibility,” *Origins* 33 (January 29, 2004).

14. But compare, more recently, the United States Conference of Catholic Bishops’ document *Forming Consciences for Faithful Citizenship: A Call to Political Responsibility from the Catholic Bishops of the United States* (November 19, 2007), para. 15: “Clergy and lay people have complementary roles

in public life. We bishops have the primary responsibility to hand on the Church’s moral and social teaching. . . . We are to teach fundamental moral principles that help Catholics form their consciences correctly, to provide guidance on the moral dimensions of public decisions, and to encourage the faithful to carry out their responsibilities in political life. *In fulfilling these responsibilities, the Church’s leaders are to avoid endorsing or opposing candidates or telling people how to vote*” (www.usccb.org/faithfulcitizenship/FCStatement.pdf [accessed September 21, 2008]).

prelate effectively campaigned against a Catholic candidate for high public office, favoring instead a born-again Methodist-Evangelical, George W. Bush. In a pastoral letter of May 2004, Bishop Michael Sheridan of Colorado Springs likewise stated without reserve or nuance:

There must be no confusion on these matters. Any Catholic politicians who advocate for abortion, for illicit stem cell research or for any form of euthanasia *ipso facto place themselves outside full communion with the Church and so jeopardize their salvation. Any Catholics who vote for candidates who stand for abortion, illicit stem cell research or euthanasia suffer the same fateful consequences. . . . As in the matter of abortion any Catholic politician who would promote so-called "same-sex marriage" and any Catholic who would vote for that political candidate place themselves outside the full communion of the Church and may not receive Holy Communion until they have recanted their positions and been reconciled by the Sacrament of Penance.*¹⁵

It is worthy of at least passing notice that these same bishops appeared willing to allow communion to Catholic politicians and judges who supported the continued use of the death penalty in the United States, who were in favor of the preemptive military strike on Iraq, and who supported the stockpiling of weapons of mass destruction by Western interests, despite opposition to all these by the Catholic hierarchy.¹⁶ In response to these individual bishops' pronouncements, the U.S. Catholic Episcopal Conference issued in June 2004 a public statement, "Catholics in Political Life," in which they appeared to uphold an individual bishops' right to proclaim such diocese-specific "excommunications,"¹⁷ though allowing also that "bishops can legitimately make different judgments on the most prudent course of pastoral action."¹⁸ The approach of then-Cardinal Ratzinger to the issue was more nuanced than that of bishops such as Burke and Sheridan. In a memorandum to the president of the U.S. Catholic Episcopal Conference, Cardinal Ratzinger stated that a Catholic politician who consistently campaigned and voted for permissive abortion and euthanasia laws—and any individual Catholic

15. Bishop Michael Sheridan, pastoral letter, "The Duties of Catholic Politicians and Voters" (2004), www.dioc.org/CPC/Corner/pastoralletters/2004/May.pdf (accessed September 21, 2008).

16. But compare the words of Pope John Paul II, *Centesimus Annus* (1991), para. 52, www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html (accessed September 21, 2008): "On the occasion of the recent tragic war in the Persian Gulf, I repeated the cry: 'Never again war!' No, never again war, which destroys the lives of innocent people, teaches how to kill, throws into upheaval even the lives of those who do the killing and leaves behind a trail of resentment and hatred, thus making it all the more

difficult to find a just solution of the very problems which provoked the war."

17. Those bishops announcing their intention to deny communion to individuals of whose voting record they disapprove claim to rely on canon 915 of the *Code of Canon Law* (1983), which refers to communion being refused to persons displaying an obstinate persistence in "manifest grave sin."

18. United States Conference of Catholic Bishops, "Catholics in Political Life" (2004), www.nccbuscc.org/bishops/catholicsinpoliticallife.shtml (accessed September 23, 2008).

who deliberately voted for a politician “precisely because of the candidate’s permissive stand on abortion and/or euthanasia” — would be guilty of “formal cooperation in evil” and therefore would be deemed “unworthy” to present him- or herself for communion. Cardinal Ratzinger did leave open the possibility that an individual voter might have “proportionate reasons” for voting for such a candidate despite his or her stand on abortion and/or euthanasia. The cardinal was careful to add that “not all moral issues have the same moral weight as abortion and euthanasia”: while the church has always and everywhere taught that abortion and euthanasia are “intrinsically evil,”¹⁹ he said, it had not shown such consistency as regards the death penalty or “just wars.”²⁰ Accordingly, Cardinal Ratzinger allowed that “there may be legitimate diversity of opinion, even among Catholics, about waging war and applying the death penalty but not however with regard to abortion and euthanasia.”²¹

Archbishop Burke returned to the fray with the publication, in October 2004, of a new pastoral letter, “On Our Civic Responsibility for the Common Good,” in which he added that individuals had a moral duty both to vote and to use that vote against any candidate supporting, inter alia, same-sex marriage, no matter that candidate’s position on any other issues.²² Archbishop Burke also unequivocally indicated his dissent from the position taken by his fellow bishops that they might “legitimately make different judgments on the most prudent course of pastoral action.”²³ The archbishop insisted that

19. See Pope John Paul II, *Veritatis Splendor* (1993), para. 81, www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html (accessed September 22, 2008): “If acts are intrinsically evil, a good intention or particular circumstances can diminish their evil, but they cannot remove it. They remain ‘irremediably’ evil acts; *per se* and in themselves *they are not capable of being ordered to God and to the good of the person.*”

20. See Aidan O’Neill, “The Supreme Court Judge and the Death Penalty,” *Tablet*, February 23, 2002, www.tablet.co.uk/articles/4534/ (accessed September 22, 2008) for reflections on the position taken by Justice Antonin Scalia on the development in recent papal teaching, notably in *Evangelium Vitae*, of a claim that the death penalty is, other than in the most exceptional circumstances, incompatible with the social doctrine of the church.

21. Cardinal Ratzinger’s memorandum to Theodore Cardinal McCarrick, “Worthiness to Receive Holy Communion: General Principles,” was published in the *Tablet*, July 10, 2004, 36, www.catholicculture.org/culture/library/view.cfm?id=6041&CFID=11939318&CFTOKEN=99858275 (accessed September 22, 2008).

22. Relying on *Catechism of the Catholic Church*, para. 2240, www.vatican.va/archive/catechism/p3s2c2a4.htm#V (accessed November 6, 2008): “Submission to authority and co-responsibility for the common good make it *morally obligatory* to pay taxes, *to exercise the right to vote*, and to defend one’s country.”

23. In the 2008 presidential race Archbishop Raymond Burke broadened his opposition to include the Democratic Party as a whole in an interview with *Avvenire*, October 2, 2008, Rome:

At this point, the Democratic Party risks transforming itself definitively into a “party of death” due to its choices on bioethical issues, as Ramesh Ponnuru wrote in his book *The Party of Death: The Democrats, the Media, the Courts and the Disregard for Human Life*. And I say this with a heavy heart, because we all know that the Democrats were the party that helped our Catholic immigrant parents and grandparents to better integrate into and prosper in American society. But it’s not the same anymore. Mine was not an isolated position. It was shared by Archbishop Charles J. Chaput of Denver, by Bishop Peter J. Jugis of Charlotte, and by others. But it is true that the bishops’ conference has not taken this position, leaving each bishop free to act as he believes is best. For my part, I always

The statement of the United States' Bishops, *Catholics in Political Life* . . . failed to take account of the clear requirement to exclude from Holy Communion those who, after appropriate admonition, obstinately persist in supporting public legislation which is contrary to natural moral law. . . . No matter how often a bishop or priest repeats the teaching of the Church regarding procured abortion, if he stands by and does nothing to *discipline a Catholic* who publicly supports legislation permitting the gravest of injustices and, at the same time, presents himself to receive holy communion, then his teaching rings hollow. To remain silent is to permit serious confusion regarding a fundamental truth of moral law. Confusion is, of course, one of the most insidious fruits of scandalous behavior.²⁴

Amid this welter of threats, it is worth recalling that the church need not regard itself in these terms and, indeed, has not always done so. No less a foundational authority than St. Augustine of Hippo urged his fellow bishops to refrain from exercising or threatening to exercise their formal powers. A Roman *comes* complained to Augustine that his local bishop had placed him with his whole household under formal condemnation, to which Augustine replied: "I would say clearly without being rash that, if anyone of the faithful has been anathematized unjustly, it would be more harmful to the one who did this injustice than the one who suffered it."²⁵ While to the anathematizing bishop, his colleague, Augustine wrote: "Do not suppose that an unjust impulse cannot creep up on us because we are bishops, but let us rather think that we live with great peril amid the snares of temptation because we are human beings."²⁶ Whether the American rigorist bishops' approach—which appears at times to restrict Catholic social doctrine to matters regarding abortion and euthanasia—reflects the teaching of a church that exhorts its faithful "to reject as unacceptable *all forms of violence*, to promote attitudes of dialogue and peace and to commit themselves to establish a just international and social order"²⁷—is a matter for a further paper.

have maintained that there must be a united position in order to demonstrate the unity of the Church in facing this serious question. Recently, I have noticed that other bishops are coming to this position. Above all, following some evidently poor statements on the part of the Speaker of the House, Nancy Pelosi, and of the Democratic candidate for vice president, Senator Joe Biden, who, while presenting themselves as good Catholics, have represented Church teaching on abortion in a false and tendentious manner.

24. Archbishop Raymond L. Burke, "The Discipline Regarding the Denial of Holy Communion to Those Obstinate Persevering in Manifest Grave Sin," *Periodica di Re Canonica* 96.1 (2007): 4.

25. Letter to Classicianus (c. 411), in *The Complete Works of Saint Augustine*, vol. 2, bk. 4 (*Letters*), trans. Roland Teske, SJ (Hyde Park, NY: New City Press, 2005), 229, para. 5.

26. Letter 250 to Bishop Auxilius of Nurco (c. 411), in *Complete Works of Saint Augustine*, vol. 2, bk. 4 (*Letters*), 185, para. 3.

27. See, for example, Pope John Paul II, *Christifidelis Laici* (1988), para. 42, www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_30121988_christifideles-laici_en.html (accessed November 3, 2008):

In order to achieve their task directed to the Christian animation of the temporal order, in the sense of serving persons and society, *the lay faithful are never to relinquish their participation in "public life"* . . . the lay

In the present context, quoting from John Paul II's encyclical *Ecclesia de Eucharistia* should suffice to make the point:²⁸

Many problems darken the horizon of our time. We need but think of the urgent need to work for peace, to base relationships between peoples on solid premises of justice and solidarity, and to defend human life from conception to its natural end. And *what should we say of the thousand inconsistencies of a globalized world where the weakest, the most powerless and the poorest appear to have so little hope!* It is in this world that Christian hope must shine forth!²⁹

The logic of the bishops' position—at least within the U.S. constitutional context—should perhaps lead them to direct their threats of ecclesiastical sanctions against those who obstruct any facet of Catholic social teaching, including its preferential option for the poor, along with its criticism of the free market and its effects on family, community, and spiritual (as opposed to material) values. Moreover, there appears to be an inconsistency evident in how and whom Catholic bishops threaten with sanctions. Should not the church sanction Catholic judges who fail to favor the “pro-life/pro-family” position in cases before their courts? Should not Archbishop Burke and like-minded American bishops insist on withholding communion from the five Catholic justices who now comprise

faithful must bear witness to those human and gospel values that are intimately connected with political activity itself, such as *liberty and justice, solidarity, faithful and unselfish dedication for the good of all, a simple life-style, and a preferential love for the poor and the least*. . . . The fruit of sound political activity, which is so much desired by everyone but always lacking in advancement, is peace. *The lay faithful cannot remain indifferent or be strangers and inactive in the face of all that denies and compromises peace, namely, violence and war, torture and terrorism, concentration camps, militarization of public life, the arms race, and the nuclear threat*. . . . The lay faithful in working together with all those that truly seek peace and themselves serving in specific organizations as well as national and international institutions, ought to promote an extensive work of education intended to defeat the ruling culture of egoism, hate, the vendetta and hostility, and thereby to develop the culture of solidarity at every level. Such solidarity, in fact, “is the way to peace and at the same time to development.” From this perspective *the Synod Fathers have invited Christians to reject as unacceptable all forms of violence, to promote attitudes of dialogue and peace and to commit themselves to establish a just international and social order*.

28. Pope John Paul II, *Ecclesia de Eucharistia* (2003), para. 20, www.vatican.va/holy_father/special_features/encyclicals/documents/hf_jp-ii_enc_20030417_ecclesia_eucharistia_en.html (accessed November 3, 2008).

29. Compare “Forming Consciences for Faithful Citizenship: A Call to Political Responsibility from the Catholic Bishops of the United States” (2007), paras. 28–29, www.usccb.org/faithfulcitizenship/FCStatement.pdf (accessed November 3, 2008):

The direct and intentional destruction of innocent human life from the moment of conception until natural death is always wrong and is not just one issue among many. It must always be opposed. . . . Racism and other unjust discrimination, the use of the death penalty, resorting to unjust war, the use of torture, war crimes, the failure to respond to those who are suffering from hunger or a lack of health care, or an unjust immigration policy are all serious moral issues that challenge our consciences and require us to act. These are not optional concerns which can be dismissed. Catholics are urged to seriously consider Church teaching on these issues. Although choices about how best to respond to these and other compelling threats to human life and dignity are matters for principled debate and decision this does not make them optional concerns. . . .

a majority of the U.S. Supreme Court if they reason and vote in particular cases before them contrary to ecclesiastical instruction? In particular, the justices' failure to overturn, or delay in overturning, the 1973 decision in *Roe v. Wade* directly affects the availability of abortion in the United States far more than, say, John Kerry's or Joseph Biden's voting record in the Senate. Just five individuals' votes, in the case of the Supreme Court, could result in the restoration to the legislatures of the individual states the regulation of abortion.

Article VI of the U.S. Constitution states that "all executive and judicial officers, both of the United States and of the several States *shall be bound by oath or affirmation to support the constitution*; but no religious test shall ever be required as a qualification to any office or public trust under the United States." And the terms of the judicial oath are provided for in 28 U.S.C. § 453 (2000) as follows:

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, _____, do solemnly swear (or affirm) 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 _____ under the Constitution and laws of the United States. So help me God."

But following the analyses of recent popes as to the requirements of justice and "equal right," a judge who reached decisions that protected or promoted, for example, abortion rights or same-sex marriage would not be administering justice or equal rights.³⁰ The Vatican Congregation for the Doctrine of the Faith under the chairmanship of then-Cardinal Ratzinger stated unequivocally that "the principles of respect and non-discrimination cannot be invoked to support legal recognition of homosexual unions." If one takes these claims seriously, the very judicial oath in the United States would seem, on its face, to be permeable to considerations derived from the social teaching of the Catholic Church. And if the Constitution of the United States and laws "properly so called" are understood as instruments intended to achieve justice rather than injustice, then the way would

30. For Pope Pius XII, see his "Duties of Catholic Jurists" (1949), reprinted in Rev. John D. Davis, *The Moral Obligations of Catholic Civil Judges* (Washington, DC: Catholic University of America Press, 1953), 223, 233:

The insoluble contrasts between the concept of man and law according to Christian principles . . . and that of juridical positivism can be a source of deep anxiety in professional life. We well know . . . how not infrequently in the soul of the Catholic jurist who wishes to remain faithful to his Christian concepts of law, there arise conflicts of conscience especially when he

must apply a law which conscience itself condemns as unjust. . . . [A] judge cannot simply throw responsibility for his decision from his own shoulders, causing it to fall on the law and its authors. Undoubtedly the authors are principally responsible for the effects of such a law. But the *judge who applies it to a particular case by his sentence is a joint cause and thus jointly responsible for these effects.*

appear to be open to a specifically Catholic interpretation by those who hold themselves to be both faithful (conforming) Catholics and faithful judges.

Thus, Cardinal Levada, formerly archbishop of San Francisco and now Joseph Ratzinger's successor as head of the Congregation for the Doctrine of the Faith, has asserted:

Over the years since the 1973 *Roe v. Wade* Supreme Court decision, the frustration of many Catholics, bishops among them, about Catholic politicians who not only ignore church teaching on abortion but actively espouse a contrary position has continued to grow. . . . Supreme Court decisions are not infrequently changed or reversed over time. The *Dred Scott* decision on slavery is perhaps the most cited case in point. The Supreme Court's judgment about the application of the Constitution should also be guided by principles of the moral law.³¹

For an American, Cardinal Levada displays a worrying lack of understanding of the constitutional history of the United States in supposing that the *Dred Scott* decision was overturned by judicial fiat. He suffers as well from a form of historical amnesia in his failure to acknowledge that slaves were held and owned by Catholic institutions based in the South right up to the Civil War (on the basis that slavery was not at that time considered by the church to be intrinsically evil).³² Instead, of course, *Dred Scott* was overturned not by the court but by the terms of the thirteenth and fourteenth amendments to the constitution, passed in 1868 in the wake of the Civil War. But if, on Cardinal Levada's understanding, the votes of Supreme Court justices are to be determined not (only) by the terms of law or the intention of the framers of the constitution but (also) by external considerations such as the requirements of the religion of the particular judge (as explained by their bishops), is there not a problem about separation of powers and about the separation of church and state?

One suspects that the church is not unaware that any explicit public attempt by Catholic bishops to dictate to Catholic judges would result in a backlash against religious interference in the affairs of the state. But it should be borne in mind that canonical penalties, such as the refusal of communion, can only be imposed against those "who obstinately persevere in their sin" or whose actions are "gravely imputable by reason of malice or negligence."³³ The public rebuke of

31. Archbishop William J. Levada, "Reflections on Catholics in Political Life and the Reception of Holy Communion," *Origins* 34 (July 1, 2004): 101–2.

32. See John T. Noonan, *A Church that Can and Cannot Change: The Development of Catholic Moral Teaching* (Notre Dame, IN: University of Notre Dame Press, 2005). Noonan claims that church teaching changed under the pontificate of John Paul II with respect to slavery and that the

church now teaches unequivocally that slavery is intrinsically evil. For criticism of this position, see Avery Cardinal Dulles, SJ, "Development or Reversal?" *First Things*, no. 156 (October 2005): 53–61.

33. *Code of Canon Law*, canons 915, 1321, www.vatican.va/archive/ENG1104/_INDEX.HTM (accessed November 5, 2008).

a public official for failing in his moral duty is, under the church's code of canon law, a remedy of very last resort.³⁴ The remedy of *publicizing* the instruction comes into play only after the primary remedy of private warning or admonition to the individual has been tried and has failed.³⁵ Assuming that private rebukes, warnings, and other attempts at fraternal correction of “erring judges” on the Supreme Court have not been essayed, it is not immediately clear why—for other than prudential reasons—the bishops should not be seeking to assert their authority (first privately and then, if necessary, publicly) over those of their flock who hold judicial office, just as the bishops have sought to assert it over those who hold or seek executive or legislative office, and over those citizens who might vote them into office.³⁶

Other bishops have done so, in their own national contexts. In May 2006, the Constitutional Court of Colombia found that the Colombian constitution gave women the right to obtain an abortion where pregnancy was a result of rape or incest or where the unborn child was so malformed as to be incapable of independent life if born.³⁷ The immediate response to this decision by Pedro Cardinal Rubiano Saenz, the archbishop of Bogotá, was to invoke canon 1308 of the *Code of Canon Law* against the judges who formed the 5–3 majority of the Constitutional Court in this decision. Canon 1308 provides that a person who procures a completed abortion incurs a *latae sententiae* (automatic) excommunication.³⁸ In September 2006, the Colombian Catholic Bishops' Conference issued a statement calling “the attention of baptized Catholics to the gravity of abortion,” calling on them to “prevent the crime from being committed,” and deploring the “abortionist mentality” manifest in the decision of the Constitutional Court. The civil law, the Colombian bishops held, “can never replace conscience or dictate norms which overstep the duty to guarantee the common good by means of recognition and protection of the basic rights of the people.” The bishops confirmed that the penalty of automatic excommunication applied to all whose actions knowingly facilitated carrying out an abortion. Their comments appear to have been directed at members of their national judiciary.

Thus, it would seem that Chief Justice Roberts and Associate Justices Scalia, Kennedy, Alito, and Thomas would, at least in the judgment of the Catholic bishops of Colombia, incur excommunication automatically, were any of them to

34. *Code of Canon Law*, canon 1341.

35. *Code of Canon Law*, canons 1339, 1347.

36. See Gregory A. Kalscheur, SJ, “Catholics in Public Life: Judges, Legislators, and Voters,” *Journal of Catholic Legal Studies* 46 (2007): 211–58, for an attempt to distinguish between the responsibilities of judges and those of legislatures.

37. *Re Monica Roa Case D6122*, Constitutional Court of Colombia, May 10, 2006.

38. See “Colombian Bishops Threaten Civil Disobedience, Excommunication for Creators of New Abortion Law,” www.catholicnewsagency.com/new.php?n=6706 (accessed November 3, 2008). See also the Freedom House summary of subsequent developments in Colombia, available at www.freedomhouse.org/uploads/ccr/country-7156-8.pdf (accessed November 3, 2008).

vote against limiting the effect of, or overturning, *Roe v. Wade*.³⁹ An alternative might be for justices who are conforming Catholics to recuse themselves from abortion cases—but, since more than half its members are Catholics, that action, or inaction, would render the Supreme Court always nonquorate to reconsider *Roe v. Wade*. Given the growing readiness in sections of the hierarchy to threaten the use of ecclesiastical sanctions against Catholic politicians and voters, it is not too early to ask whether Catholics should continue to participate at all in public life—as legislators, judges, administrators, or even voters—within liberal pluralist democracies.

A “Necessary Conformity of Civil Law with the Moral Law”

But really, what is the problem? *Is there a problem?* The bishops protest that they are simply reiterating the church’s constant social teaching on respect for life and on matters of sexual ethics.⁴⁰ They are just doing their job.⁴¹ But of course they are not just teaching; they are giving instructions and issuing threats. Theirs is a model of society in which people can be told how to vote and be punished, eternally, if they fail to do so in the required manner.

If the bishops’ threatened use of church disciplinary measures were successful, a Catholic bloc would emerge whose votes could be delivered on call. The bishops would become political players, of similar influence and importance to the trade-union barons of old Labour (in a British context) or to the lords of Tammany Hall (in New York). In this way, the institutional church might increase its power within civil society—even where Catholics form a minority of the electorate—and politicians would once again fear the wrath and condemnation of turbulent priests. The legislature (and courts) could be expected to push through a quite radical social program. Given the tone of some of the recent pronounce-

39. But see Justice Antonin Scalia, “God’s Justice and Ours,” *First Things* (May 2002): 17–21: “[A] judge, I think, bears no moral guilt for the laws society has failed to enact. Thus, my difficulty with *Roe v. Wade* is a legal rather than a moral one: I do not believe (and, for two hundred years, no one believed) that the Constitution contains a right to abortion. And if a state were to permit abortion on demand, I would—and could in good conscience—vote against an attempt to invalidate that law for the same reason that I vote against the invalidation of laws that forbid abortion on demand: because the Constitution gives the federal government (and hence me) no power over the matter.”

40. As it is put by the Congregation for the Doctrine of the Faith in a doctrinal note of 2002, “Regarding the Participation of Catholics in Public Life,” para. 6, [www.vatican](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html)

[_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) (accessed November 3, 2008): “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.”

41. See Archbishop Raymond L. Burke, “Catholic Politicians and Bishops,” *America*, June 21–28, 2004, www.americamagazine.org/content/article.cfm?article_id=3636.

ments emanating from the Vatican, the “Catholic agenda” might include policies such as these:

- accepting, within domestic jurisdictions, the binding and enforceable nature of international (humanitarian) law⁴² and, more specifically, affirming the jurisdiction of the international criminal court over the state’s nationals;⁴³
- recriminalizing abortion,⁴⁴ as well as banning the manufacture and sale of IUDs and the “morning-after pill”;⁴⁵
- outlawing human embryonic stem cell research⁴⁶ and the therapeutic or reproductive cloning of human embryos;⁴⁷

42. See Pope Benedict XVI, “The Human Family: A Community of Peace” (2008), paras. 11, 13, www.vatican.va/holy_father/benedict_xvi/messages/peace/documents/hf_ben-xvi_mes_20071208_xli-world-day-peace_en.html (accessed November 3, 2008):

The family of peoples experiences many cases of arbitrary conduct, both within individual States and in the relations of States among themselves. . . . power must always be disciplined by law, and this applies also to relations between sovereign States. Values grounded in the natural law are indeed present, albeit in a fragmentary and not always consistent way, in international accords, in universally recognized forms of authority, in the principles of humanitarian law incorporated in the legislation of individual States or the statutes of international bodies. Mankind is not lawless. All the same, there is an urgent need to persevere in dialogue about these issues and to encourage the legislation of individual States to converge towards a recognition of fundamental human rights.

43. Pontifical Council for Justice and Peace, *A Compendium of the Social Doctrine of the Church* (2004), para. 506, www.vatican.va/holy_father/benedict_xvi/messages/peace/documents/hf_ben-xvi_mes_20071208_xli-world-day-peace_en.html (accessed November 3, 2008) states: “There is also present within the international community an International Criminal Court to punish those responsible for particularly serious acts such as genocide, crimes against humanity, war crimes and crimes of aggression. The Magisterium has not failed to encourage this initiative time and again.”

44. See “Charter of the Rights of the Family, presented by the Holy See to all persons, institutions and authorities concerned with the mission of the family in today’s world” (October 22, 1983), article 4(a), www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html (accessed November 3, 2008): “Human life must be respected and protected absolutely from the moment of conception. Abortion is a direct violation of the fundamental right to life of the human being.” See also Congregation

for the Doctrine of the Faith, “Declaration on Procured Abortion” (November 18, 1974), para. 22, www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html (accessed November 3, 2008): “It must in any case be clearly understood that whatever may be laid down by civil law in this matter, man can never obey a law which is in itself immoral, and such is the case of a law which would admit in principle the liceity of abortion.”

45. Pope John Paul II, *Evangelium Vitae* (1995), para. 13, www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html (accessed November 3, 2008): “The close connection which exists, in mentality, between the practice of contraception and that of abortion is becoming increasingly obvious. It is being demonstrated in an alarming way by the development of chemical products, intrauterine devices and vaccines which, distributed with the same ease as contraceptives, really act as abortifacients in the very early stages of the development of the life of the new human being.”

46. *Evangelium Vitae*, para. 63:

the use of human embryos or fetuses as an object of experimentation constitutes a crime against their dignity as human beings who have a right to the same respect owed to a child once born, just as to every person. This moral condemnation also regards procedures that exploit living human embryos and fetuses—sometimes specifically “produced” for this purpose by in vitro fertilization—either to be used as “biological material” or as providers of organs or tissue for transplants in the treatment of certain diseases. The killing of innocent human creatures, even if carried out to help others, constitutes an absolutely unacceptable act.

See also “Charter of the Rights of the Family,” article 4(b): “Respect of the dignity of the human being excludes all experimental manipulation or exploitation of the human embryo.”

47. *Compendium of the Social Doctrine of the Church*, para. 236, states:

- creating animal/human-hybrid or admixed embryos by cloning, or using human biological material obtained from aborted embryos in scientific research or for the production of vaccines or other products;⁴⁸
- halting the in vitro production of human embryos even for the purposes of overcoming a (married) couple's infertility,⁴⁹ as well as prohibiting surrogacy and donor arrangements in relation to assisted pregnancy;⁵⁰
- strengthening the laws against euthanasia and physician-assisted suicide;⁵¹
- improving prison conditions⁵² and abolishing (except, perhaps, in the most extreme circumstances) the death penalty;⁵³

From an ethical point of view, the simple replication of normal cells or of a portion of DNA presents no particular ethical problem. Very different, however, is the Magisterium's judgment on cloning understood in the proper sense. Such cloning is contrary to the dignity of human procreation because it takes part in the total absence of an act of personal love between spouses, being agamic and asexual reproduction. In the second place, this type of reproduction represents a form of total domination over the reproduced individual on the part of the one reproducing it. The fact that cloning is used to create embryos from which cells can be removed for therapeutic use does not attenuate its moral gravity, because in order that such cells may be removed the embryo must first be created and then destroyed.

48. Congregation for the Doctrine of the Faith Instruction, "*Dignitatis Personae*: On Certain Bioethical Questions" (2008), paras. 33–35, www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html (accessed January 14, 2009).

49. Congregation for the Doctrine of the Faith Instruction, "*Dignitatis Personae*," para. 18.

50. *Compendium of the Social Doctrine of the Church*, para. 235, states:

All reproductive techniques—such as the donation of sperm and ova, surrogate motherhood, heterologous artificial fertilisation—that make use of the uterus of another woman or of the gametes of persons other than the married couple, injuring the right of the child to be born of one father and one mother who are father and mother both from a biological and from a legal point of view are ethically unacceptable. Equally unacceptable are methods that separate the unitive from the procreative act by making use of laboratory techniques, such as homologous artificial insemination or fertilisation, such that the child comes about more as the result of an act of technology than the natural fruit

of a human act in which there is full and total giving of the couple.

51. See Sacred Congregation for the Doctrine of the Faith, "Declaration on Euthanasia" (1980), www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19800505_euthanasia_en.html (accessed November 3, 2008): "nothing and no one can in any way permit the killing of an innocent human being, whether a fetus or an embryo, an infant or an adult, an old person, or one suffering from an incurable disease, or a person who is dying. . . . It may happen that, by reason of prolonged and barely tolerable pain, for deeply personal or other reasons, people may be led to believe that they can legitimately ask for death or obtain it for others. Although in these cases the guilt of the individual may be reduced or completely absent, nevertheless the error of judgment into which the conscience falls, perhaps in good faith, does not change the nature of this act of killing, which will always be in itself something to be rejected."

52. *Compendium of the Social Doctrine of the Church*, para. 403, states: "Unfortunately the conditions under which prisoners serve their time do not always foster respect for their dignity; and often prisons become places where new crimes are committed."

53. *Evangelium Vitae*, para. 56: "the nature and extent of the punishment [meted out to offenders] 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."

- limiting the availability of contraceptives⁵⁴ and promoting a sex-education curriculum⁵⁵ directed against the present day’s “contraceptive mentality”;⁵⁶
- withdrawing legal recognition from unmarried de facto family relationships;⁵⁷
- making divorce more difficult⁵⁸ and also, conceivably, prohibiting remarriage after divorce;⁵⁹
- supporting measures enabling women to participate equally and without suffering discrimination in the workplace;⁶⁰
- promoting the integration of people with disabilities into society and, in particular, ensuring that they are not discriminated against in the workplace;⁶¹
- withdrawing the protection of antidiscrimination laws that cover sexual orientation⁶² and vetoing every legal recognition of same-sex unions;⁶³

54. See “Charter of the Rights of the Family,” article 3: “The spouses have the inalienable right to found a family and to decide on the spacing of births and the number of children to be born, taking into full consideration their duties towards themselves, their children already born, the family and society, in a just hierarchy of values and in accordance with the objective moral order which excludes recourse to contraception, sterilization and abortion.” See also Archbishop Raymond L. Burke, “On the Dignity of Human Life and Civic Responsibility” (2003), www.wf-f.org/Burke-Life-CivicRespons.html (accessed November 3, 2008).

55. “Charter of the Rights of the Family,” article 5(c): “Parents have the right to ensure that their children are not compelled to attend classes which are not in agreement with their own moral and religious convictions. In particular, sex education is a basic right of the parents and must always be carried out under their close supervision, whether at home or in educational centers chosen and controlled by them.”

56. For “contraceptive mentality,” see *Evangelium Vitae*, para. 13.

57. Pope John Paul II, “Address to the Tribunal of the Roman Rota” (2002): “[There must be] resolute opposition to any legal or administrative measures that . . . equate de facto unions—including those between homosexuals—with marriage.” See also “Charter of the Rights of the Family,” article 1(c): “The institutional value of marriage should be upheld by the public authorities; the situation of non-married couples must not be placed on the same level as marriage duly contracted.”

58. “Charter of the Rights of the Family,” article 6(b): “The family has the right to exist and to progress as a family. . . . Divorce attacks the very institution of marriage and of the family.”

59. See, for instance, John Paul II, “Address to the Tribunal of the Roman Rota.”

60. *Compendium of the Social Doctrine of the Church*, para. 295, states: “The feminine genius is needed in all expressions in the life of society, therefore the presence of women in the workplace must also be guaranteed.”

61. *Compendium of the Social Doctrine of the Church*, para. 148, states:

The rights of persons with disabilities need to be protected with effective and appropriate measures. “It would be radically unworthy of man, and a denial of our common humanity, to admit to the life of the community, and thus admit to work, only those who are fully functional. To do so would be to practise a serious form of discrimination, that of the strong and healthy against the weak and sick.” Great attention must be paid not only to the physical and psychological work conditions, to a just wage, to the possibility of promotion and the elimination of obstacles but also to the affective and sexual dimensions of people with disabilities.

62. See Congregation for the Doctrine of the Faith, “Some Considerations concerning the Response to Legislative Proposals on the Non-discrimination of Homosexual Persons” (1992), paras. 14, 17, www.ewtn.com/library/curia/cdfhomol.htm (accessed November 5, 2008), where it is warned that “there is a danger that legislation which would make homosexuality a basis for entitlements could actually encourage a person with a homosexual orientation to declare his homosexuality or even to seek a partner in order to exploit the provisions of the [anti-discrimination] law. . . . where a matter of the common good is concerned, it is inappropriate for church authorities to endorse or remain neutral toward adverse legislation.”

63. “Considerations regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons,” paras. 6, 8, www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html (accessed November 5, 2008):

- licensing and encouraging biotechnological innovations (including genetic modification) in the area of plant and (nonhuman) animal life.⁶⁴

It should be emphasized that the church does not regard this radical social program as a “Catholic agenda.” Legislation of this nature, according to the Vatican, would be intended to instantiate the natural law, which sets out objective standards of justice and morality applicable to all.⁶⁵ As Pope John Paul II wrote:

The value of democracy stands *or falls* with the values which it embodies and promotes. . . . The basis of these values cannot be provisional and changeable “majority” opinions, but only the acknowledgment of an objective moral law which, as the “natural law” written in the human heart, is the obligatory point of reference for civil law itself. . . . Even in participatory systems of government, the regulation of interests often occurs to the advantage of the most powerful, since they are the ones most capable of manoeuvring not only the levers of power but *also of shaping the formation of consensus. In such a situation, democracy easily becomes an empty word.* It is therefore urgently necessary, for the future of society and the development of a *sound* democracy, to rediscover those essential and innate human and moral values which flow from the very truth of the human being and express and safeguard the dignity of the person: *values which no individual, no majority and no State can ever create, modify or destroy, but must only acknowledge, respect and promote.*⁶⁶

Laws in favour of homosexual unions are contrary to right reason because they confer legal guarantees, analogous to those granted to marriage, to unions between persons of the same sex. . . . The principles of respect and non-discrimination cannot be invoked to support legal recognition of homosexual unions. Differentiating between persons or refusing social recognition or benefits is unacceptable only when it is contrary to justice. The denial of the social and legal status of marriage to forms of cohabitation that are not and cannot be marital is not opposed to justice; on the contrary, justice requires it.

64. *Compendium of the Social Doctrine of the Church*, para. 473, states: “The Christian vision of creation makes a positive judgment on the acceptability of human intervention in nature, which also includes other living beings, and at the same time makes a strong appeal for responsibility. . . . the human person does not commit an illicit act when, out of respect for the order, beauty and usefulness of living beings, and their function in the eco-system, he intervenes by modifying some of their characteristics or properties. Human interventions that damage living beings or the natural environment deserve condemnation, while those that improve them are praiseworthy.”

65. Joseph Cardinal Ratzinger, “Crisis of Law” (1999), www.ewtn.com/library/Theology/LAWMETA.HTM (accessed November 5, 2008):

Juridical positivism . . . has taken on the form of the theory of consensus: if reason is no longer able to find the way to metaphysics as the source of law, the State can only refer to the common convictions of its citizens’ values, convictions that are reflected in the democratic consensus. Truth does not create consensus, and consensus does not create truth as much as it does a common ordering. The majority determines what must be regarded as true and just. In other words, law is exposed to the whim of the majority, and depends on the awareness of the values of the society at any given moment, which in turn is determined by a multiplicity of factors. This is manifested concretely by the progressive disappearance of the fundamentals of law inspired in the Christian tradition. . . . Because in modern States metaphysics, and with it, Natural Law, seem to be definitely depreciated, there is an ongoing transformation of law, the ulterior steps of which cannot yet be foreseen; the very concept of law is losing its precise definition.

66. *Evangelium Vitae*, paras. 70–71.

These laws encouraged by the Vatican are held to derive their binding force and legitimacy not from consent of the people but from their harmony with the world as God intended it. The model assumes that God created humanity—and each other component of the universe—with a fundamentally fixed nature or essence. It further assumes that, by careful observation, it is possible to discern various natural laws that govern the appropriate exercise of that nature. These laws are in principle immutable since human nature is (said to be) an unchanging given. All and any acts undertaken contrary to these natural laws will be, in all circumstances, objectively immoral because they are contrary to nature and to God’s purpose.⁶⁷ Further, the model assumes that civil law should reflect and enforce the moral norms of natural law. As the Congregation for the Doctrine of the Faith has put it:

Civil law *cannot* contradict right reason without losing its binding force on conscience. *Every humanly-created law is legitimate insofar as it is consistent with the natural moral law*, recognized by right reason, and insofar as it respects the inalienable rights of every person.⁶⁸

Moreover, in *Evangelium Vitae*, John Paul II states that “the doctrine on *the necessary conformity of civil law with the moral law is in continuity with the whole tradition of the Church.*”⁶⁹ By contrast, however, St. Thomas Aquinas held that it is not the business of human law either to restrain all moral vices or to require the execution of all virtuous acts. Immorality does not map directly onto illegality.⁷⁰ The apparent collapse, in recent Vatican pronouncements, of the careful distinctions made by Aquinas does make it seem that the temptation of *shari’a* has been irresistible to the church. A profound lack of sympathy on the part of the Vatican with specific legal developments in the Western democracies—particularly in the areas of sexuality, family, and the right to life—has perhaps led the church away from the Thomist recognition of the dignity and integrity of the system of positive civil law. Be that as it may, the church is clearly not, or no longer, persuaded that the system of civil law creates a normative order of binding obligations independent of their consistency or congruence with the moral order of nature. What, then, is the difference between this agenda of the church and the determination of

67. See Pope Leo XIII’s encyclical *Libertas: On the Nature of Human Liberty* (1888), para. 15, www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_20061888_libertas_en.html (accessed November 5, 2008).

68. “Considerations regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons,” para. 6.

69. *Evangelium Vitae*, para. 72.

70. *Summa Theologiae* Ia–IIae, q. 95, aa. 4, 5.

radical Islamists to make *shari'a* the civil law in all Muslim countries?⁷¹ Why, for example, should Catholic prelates not call for the recriminalization of adultery, as has been proposed in Turkey? Adultery, after all, is forbidden in the Ten Commandments and considered by the church to be an objectively immoral act that undermines the very basis of civil society—the family.

The legal agenda of the church could well be more radical in scope than even the Islamists' program, because the church contends that the moral standards it seeks to guarantee through legislation are products of rational reflection on the human condition. They are therefore standards that everyone, regardless of religious belief or culture, can properly be expected to recognize and affirm.⁷² As *Veritatis Splendor* formulates this proposition:

Only by obedience to universal moral norms does man find full confirmation of his personal uniqueness and the possibility of authentic moral growth. For this very reason, this service is also directed to *all mankind*: it is not only for individuals but also for the community, for society as such. These norms in fact represent the unshakable foundation and solid guarantee of a just and peaceful human coexistence, *and hence of genuine democracy*. . . . In the end, only a morality which acknowledges certain norms as valid always and for everyone, with no exception, can guarantee the ethical foundation of social coexistence, both on the national and international levels.⁷³

Contrary to its own emphatic claim, this high theocratic vision is very difficult to square with the democratic ideals to which Western societies now adhere and that our politicians seek so zealously to spread among the nations of the developing world and the Islamic world. In the bishops' vision of its realization on earth, the City of God has little room for the variety of interests and viewpoints upon which actual democracies are founded and survive.

71. In *Refah Partisi (the Welfare Party) v. Turkey* (2003) 37 EHRR 1 (ECtHR [Grand Chamber], February 13, 2003) the European Court of Human Rights held that a political program seeking the introduction of *Shari'a* as the basis of civil law in Turkey was incompatible with the European Convention on Human Rights and hence with the conception of European democracy, which was said to be based on pluralism, freedom of speech, the separation of church (or mosque) from state, and due respect for human rights. See Mustafa Koçak and Esin Öricü, "Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights," *European Public Law* 9:3 (2003): 399–424.

72. Thus, *Compendium of the Social Doctrine of the Church*, para. 84, states:

every conscience and mind is in a position to grasp the human depths of meaning and values expressed in [the Roman Catholic social doctrine] and the potential of humanity and humanization contained in its norms of action. It is to all people—in the name of mankind, of human dignity which is one and unique, and of humanity's care and promotion of society—to everyone in the name of the one God, Creator and ultimate end of mankind, that the Church's social doctrine is addressed. This social doctrine is a teaching explicitly addressed to all people of good will, and in fact is heard by members of other Churches and Ecclesial Communities, by followers of other religious traditions and by people who belong to no religious group.

73. Pope John Paul II, *Veritatis Splendor*, paras. 96–97.

Conscientious Objection to Unjust Laws

However, while awaiting the establishment of the godly state, church authorities in the post-Nuremberg context have relied less on the assertion of theocratic power than on the right, guaranteed to them in democratic societies, to freedom of religion and freedom of expression. These democratic rights have become the basis for the bishops' claim of entitlement to intervene in issues of public policy that touch upon questions of morality.⁷⁴ Moreover, the bishops' criticism of laws to which they object has tended to be framed in the language of fundamental human rights. In the Vatican's *Compendium of the Social Doctrine of the Church*, for example, we find it affirmed that "the movement towards the identification and proclamation of human rights is one of the most significant attempts to respond effectively to the inescapable demands of human dignity":

The ultimate source of human rights is not found in the mere will of human beings, in the reality of the State, in public powers, but in man himself and in God his Creator. These rights are "universal, inviolable, inalienable." Universal because they are present in all human beings without exception of time, place or subject. Inviolable insofar as "they are inherent in the human person and in human dignity" and because "it would be vain to proclaim rights, if at the same time everything were not done to ensure the duty of respecting them by all people, everywhere, and for all people." Inalienable insofar as "no one can legitimately deprive another person, whoever they may be, of these rights, since this would do violence to their nature."⁷⁵

The problem with many recent documents emanating from the Vatican, and from some of the more politically activist bishops, is the lack of adequate awareness of what use of the language of human rights, in the context of democratic society, commits them to as a matter of process. Likewise, there seems to be inadequate awareness of the complexities involved in the processes by which the rule of law is carried out. And perhaps of most far-reaching significance, the bishops show inadequate awareness that fidelity to the values of legality and constitutionality is itself a moral requirement for participation in democratic public

74. The summary passage following is taken from an address to the sixtieth session of the UN Human Rights Commission, April 2004, by Archbishop Silvano Tomasi, the Holy See's permanent observer at the UN offices in Geneva, para. 4, www.vatican.va/roman_curia/secretariat_state/2004/documents/rc_seg-st_20040401_tomasi-religious-freedom_en.html (accessed November 5, 2008): "An emerging subtle form of religious intolerance is opposing the right of religion to speak publicly on issues concerning forms of behavior that are measured against principles of a moral and religious nature. While respect-

ing a healthy sense of the state's secular nature, the positive role of believers in public life should be recognized. This corresponds, among other things, to the demands of a healthy pluralism and contributes to the building up of authentic democracy. Religion cannot be relegated to a corner of the private sphere of life and in this way risk losing its social dimension and its charitable action toward vulnerable people it serves without any distinction."

75. *Compendium of the Social Doctrine of the Church*, paras. 152–53.

life. On the bishops' political model, the individual's obedience to the laws of the state (no matter what position the individual holds within the state) is always contingent on those laws' conforming to the demands of God, as mediated through his church. In the words of the catechism:

The citizen is obliged in conscience not to follow the directives of civil authorities when they are contrary to the demands of the moral order, to the fundamental rights of persons or the teachings of the Gospel. *Refusing obedience to civil authorities, when their demands are contrary to those of an upright conscience, finds its justification in the distinction between serving God and serving the political community.*⁷⁶

Applying this principle, John Paul II set down:

Laws which authorize and promote abortion and euthanasia are . . . radically opposed not only to the good of the individual but also to the common good; as such they are completely lacking in *authentic juridical validity*. . . . [A] *civil law authorizing abortion or euthanasia ceases by that very fact to be a true, morally binding civil law. Abortion and euthanasia are thus crimes which no human law can claim to legitimize.* There is no obligation in conscience to obey such laws; instead *there is a grave and clear obligation to oppose them by conscientious objection*. . . . It is precisely from *obedience to God*—to whom *alone* is due that fear which is acknowledgment of his absolute sovereignty—that the strength and the courage to *resist* unjust human laws are born. It is the strength and the courage of those prepared even to be imprisoned or put to the sword, in the certainty that this is what makes for “the endurance and faith of the saints.” (Rev. 13:10)⁷⁷

This last passage relies paradoxically on the primacy of individual conscience—otherwise denied (at least by rigorist bishops) to legislators, judges, and voters—in combination with the language of John's Apocalypse. Comparisons are drawn with the Christian martyrs of ancient Rome. At the same time, John Paul II sought the protection of the civil law for those who would disobey those civil laws from which the church dissented. “Morally upright people,” he stated, “have a right to demand not to be forced to take part in morally evil actions. . . . To refuse to take part in committing an injustice is not only a moral duty; it is also a basic human right. . . . Those who have recourse to conscientious objection must be protected not only from legal penalties but also from any negative effects on the legal, disciplinary, financial and professional plane.”⁷⁸ What the late pope seems to have been calling for is a legally guaranteed right for individuals—in

76. *Catechism of the Catholic Church*, para. 2242.

78. *Evangelium Vitae*, para. 74.

77. *Evangelium Vitae*, paras. 72–73.

the name of individual conscience—to dissent from and oppose laws with which they are in moral disagreement. It is difficult to see how the legal system of any democracy could permit its citizens this pick-and-choose approach to legality.⁷⁹ The attitude to the civil law taken by church authorities indeed parallels the “à la carte Catholicism” that the hierarchy accuses Catholics who (for example) use birth control of practicing. The church appears to indulge in “à la carte constitutionalism” when its *Compendium of Social Doctrine* states:

Recognizing that natural law is the basis for and places limits on positive law means admitting that it is legitimate to resist authority should it violate in a serious and repeated manner the essential principles of natural law. Saint Thomas Aquinas writes (in *Summa Theologiae* IIa–IIae, q. 104, a. 6, ad 3um) that “one is obliged to obey . . . insofar as it is required by the order of justice.” *Natural law is therefore the basis of the right to resistance.* There can be many different concrete ways this right may be exercised; there are also many different ends that may be pursued. *Resistance to authority is meant to attest to the validity of a different way of looking at things, whether the intent is to achieve partial change, for example, modifying certain laws, or to fight for radical change in the situation. . . .* The gravity of the danger that recourse to violence entails today makes it preferable in any case that passive resistance be practiced, which is “a way more conformable to moral principles and having no less prospects of success.”⁸⁰

If the church is going to promote conscientious objection to the laws of civil society, it needs to do better than *that*. First, the statement appears to contravene traditional Catholic moral teaching by suggesting that good ends can justify disorderly means.⁸¹ Truly *conscientious* objection must be rooted in fidelity to the legal values of civil society and to the democratic process that produced the whole corpus of law.⁸² Otherwise, far from being conscientious—an act of

79. Thus, in *Pichon and Sajous v. France* (nonadmissibility decision of October 2, 2001), the European Court of Human Rights rejected as “manifestly ill-founded” a complaint by two licensed pharmacists that their criminal conviction—resulting from their refusal, on religious grounds, to supply women with contraceptives prescribed by their doctors—contravened their right to freedom of thought, conscience, and religion guaranteed under article 9 ECHR. The court held that “as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere” (www.reproductiverights.org/pdf/pub_bp_RREuropeanCourt.pdf).

80. *Compendium of the Social Doctrine of the Church*, paras. 399–401.

81. As is noted in *Veritatis Splendor*, para. 72: “human activity cannot be judged as morally good merely because it is a means for attaining one or another of its goals, or simply because the subject’s intention is good.” Cf. Aquinas, *Summa Theologiae* IIa–IIae, q. 148, a. 3.

82. The EU Charter of Fundamental Rights provides in article 10(2), www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed November 5, 2008) as follows: “The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.”

loyal opposition — “objection” or self-exemption becomes contempt for the law and the political system sustaining it.

Respect for Human Rights as a Specifically Democratic Principle

Though church documents sharply critical of civil society have increasingly been framed in the language of human rights, the Vatican itself—as a sovereign European state—has not subscribed to the European Convention on Human Rights.⁸³ But if the church is willing to use human rights language to criticize civil society, then it has also to be open to the possibility that the church itself may be criticized and judged with reference to these same standards.⁸⁴ The Vatican’s *Compendium of Social Doctrine* acknowledges that “the Church profoundly experiences the need to respect justice and human rights within her own ranks.”⁸⁵ The difficulty is that the church uses the language of human rights as if it were simply another way of talking about natural law. The popes, the curia, and the bishops appear to assume that, when participating in human rights discourse, they do no more than translate the church’s constant teaching into intelligible contemporary terms.

This assumption on the part of church authorities is mistaken: it is a basic category or framework error. In Catholic teaching, “natural law” is a specifically Christian theological account of what makes actions by human beings into moral actions and of what gives human (positive) laws their prescriptive or binding force. But talk about fundamental rights, post-Nuremberg, is not talk about theology, nor is it talk about virtue (which surely is the proper focus of any Christian morality). “Fundamental rights talk” is best understood as the articulation of a specifically political attitude toward the power of the state; namely, that its power is not unlimited. A concrete expression of the limitation on power is that the state and its agents can be held to account, as a matter of law, for conduct held to be incompatible with respect for a set of basic values. Talk of fundamental rights in

83. The Holy See does have observer status before the Council of Europe. Among the institutions set up under the auspices of the Council of Europe is the European Court of Human Rights which adjudicates on the proper interpretation of the European Convention of Human Rights.

84. In *Pellegrini v. Italy* (2002) 35 EHRR 2, the European Court of Human Rights found in 2001 that the procedures of the Roman Rota, the ecclesiastical appeals court responsible for marriage-annulment applications, failed to reach the standards required for a fair trial under article 6(1) of the European Convention and that, therefore, its judgments could not properly be recognized and enforced under Italian law. ECHR noted that, in Rota proceedings,

witness statements were not provided to parties and that thus there was no opportunity for the parties to comment on them. Parties were not advised that they could appoint lawyers to appear for them, nor advised of the terms of the legal submissions made by the canon lawyer appointed by the court to argue against annulment. Finally, the parties were refused sight of a full copy of the Rota’s judgment, in which the ecclesiastical court set out its reasoning. Given these circumstances, the Strasbourg court took the view that justice was not done in annulment proceedings before church courts.

85. *Compendium of the Social Doctrine of the Church*, para. 159.

this mode arose from the historical experience (particularly in Nazi Germany) of how very far state power, when constitutionally unlimited, can go in abusing individuals. Our contemporary talk of human rights seeks to protect individuals from the state and its agents. The focus of human rights legislation is individualistic, its methods are thus by definition legalistic; and its end is the preservation of self-interests. Given its source and historical context, human rights talk does not directly address the duties owed by individuals to others. Nor does it address the interests of the community over and against those of the individual. In other words, the church has so far failed to take account adequately of the political (and specifically, the democratic) context in which the idea of human rights is now embedded. In decontextualizing, de-democratizing, and dehistoricizing human rights, the church is bound to continue misrepresenting them. As for the specific processes by which democracies embody the rule of law, the Roman Catholic Church—in stark contrast, say, to the Church of Scotland—is not a democracy (the laity have no vote in its governance), nor has the sovereign State of the Vatican City participated in constructing the sets of legally enforceable rights affirmed since World War II.⁸⁶

The context within which governments have bound themselves to honor these sets of rights is best understood in terms of legal structures. The nations of the world reacted, by means of human rights legislation, against the perversion of the form of the law under the Nazi state and against the consequent corruption of those who participated as lawyers and judges in that system.⁸⁷ The unique horror of the Nazi system is that it purported to maintain the forms of law and legality while routinely using torture against individuals, reversing the presumption of innocence and the principle that criminal legislation should not be applied retrospectively, and legislating for people to be held under conditions of slavery. Under its “Nuremberg laws,” the Nazi state grossly invaded the privacy of those under its rule, denying them free expression, free assembly, and the freedom of thought, conscience, and religion. In the name of “eugenics,” the Nazi authorities withdrew from certain individuals the right to marry and found a family.

86. The text of the Fundamental Law of the State of the Vatican City, which was promulgated in November 2000, may be found at www.vatican.va/vatican_city_state/legislation/documents/scv_doc_20001126_legge-fondamentale-scv_it.html (accessed November 5, 2008). Article 1(1) confirms the essentially monarchical nature of the Vatican’s constitution: “The Supreme Pontiff, as sovereign power of the Vatican State, holds full executive, legislative and judicial power.”

87. Nuremberg “Case 3” (or *United States v. Altstötter and Others*) concerned the prosecution of a selection of sixteen jurists who had participated in the German legal system during the Nazi era. The prosecution described them as representative of “what passed for justice in the Third Reich,” and they were put on trial for “judicial murder and other atrocities which they committed by destroying law and justice in Germany and by utilising the empty forms of legal process for persecution, enslavement and extermination on a vast scale.” See *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg October 1946–April 1949*, 10 vols. (Washington, DC: United States Government Printing Office, 1951), 3:32–33.

Notoriously, they discriminated among the populations under their control on the grounds of “race,” religion, and national and social origin. In the words of the Nuremberg War Crimes Tribunal, the Nazi legal system was

a nation-wide government-organised system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist.⁸⁸

The Nazi state did not simply discriminate against certain populations, it “legitimized” that discrimination as well as, in time, the expropriation and wholesale extermination of the Jews of Europe.

Thus it was jurists who assembled after the war to set out, both in international charters and in national constitutional documents, the substance of the moral underpinnings to the domestic law of states. The United Nations issued the Universal Declaration of Human Rights in 1948. Regional agreements expounding further the principles of international humanitarian law were entered into as well, notably the 1950 European Convention on Human Rights. The postwar German national constitution, the *Grundgesetz*, set out a list of basic rights that the state was henceforth bound to accept and that could not be changed or abrogated even by constitutional amendment. In the postwar process of decolonization, states newly independent of the British empire wrote constitutions containing bills of fundamental rights modeled on the European Convention.⁸⁹ Meanwhile, Canada, New Zealand, and South Africa formulated and adopted their own bills of fundamental rights and freedoms. These human rights documents (and related developments in the common law) were responses to the insight that, in the absence of legally enforceable limits, state power can do great evil; but a second primary insight emerged as well from the Nuremberg trial process. The judges at Nuremberg rejected the “only following orders” defense—the plea that a defendant had been acting in accordance with the laws of his place and time. Instead the judges mandated the punishment of individuals for acts or omissions deemed criminal “according to the general principles of law recognized by civilised nations.”⁹⁰ “Crimes against international law,” the judges wrote, “are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be

88. See *Trials of War Criminals before the Nuremberg Military Tribunals*, 3:984–85.

89. See A. W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001).

90. See Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (London: Tauris, 1991), esp. 274. See also Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany* (Chicago: University of Chicago Press, 1998).

enforced.”⁹¹ This decision was far-reaching and by no means limited to combatants and government officials or employees.⁹²

Almost every nation (with the possible exception of the United States) experienced significant constitutional change or development since World War II, whether through the creation of the European Union, the dismantling of the communist system, the process of decolonization, the transformation of the British empire into the Commonwealth, or the ending of South African apartheid. Human rights charters have come to embody the essence of what we mean by “rule of law.” Making human rights into legally enforceable standards is by now seen as fundamental to what it is to be a democracy.⁹³ The legal systems of most of the world are now “post-Nuremberg” systems in that they have accepted that morality and law are not wholly distinct and separate spheres, and that those who hold office within national legal systems have a duty to *administer justice* in accordance with humanitarian principles and not simply and mechanistically *apply laws* of their own states. The Lisbon Reform Treaty—which was agreed to by the governments of the EU member states in 2007 and is now in the process of ratification by the national parliaments—made explicit this “value laden” aspect of the laws and constitutions of European states by inserting the following text into the preamble to the Treaty on European Union:

Drawing inspiration from the cultural, religious, and humanist inheritance of Europe, from which have developed the universal values of inviolable and inalienable rights of the human person, freedom, democracy, equality, and the rule of law, . . . the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member

91. *Trials of War Criminals before the Nuremberg Military Tribunals*, 3:53.

92. See *Harvard Law Review* 64 (1951): 1005–7 on the case of a woman who, with a view to effecting a swift end to her marriage, denounced her husband to the authorities for slandering Hitler. Her husband was imprisoned and sentenced to death (a sentence later commuted to military service on the Russian front). The woman was convicted in the postwar German courts for her reliance, in bad faith, on the patently unjust laws of the Nazi system. See also commentary on this and similar cases in H. O. Pappé, “On the Validity of Judicial Decisions in the Nazi Era,” *Modern Law Review* 23 (1960): 260–74. Compare the Zyklon B case decision of the British Military Court of March 1946—a prosecution of the industrialists who produced and delivered the poison gas used for the mass extermination in German death camps—which has the following commentary at page 1498: “The decision of the

Military Court in the present case is a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authority, but to anybody who is in a position to assist in their violation. The activities with which the accused in the present case were charged were commercial transactions conducted by civilians. The Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal.”

93. See *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532, HL per Lord Cook of Thorndon at 548, para. 30: “The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.”

States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail.⁹⁴

There is no doubt that many of the values that Western democratic states now proclaim have their roots in Christian moral traditions. But other values—such as freedom of speech, pluralism, and tolerance—have their roots in the Enlightenment rejection of institutional Christianity. And while, in its 1965 declaration *Dignitatis Humanae*,⁹⁵ the Roman Catholic Church finally affirmed the importance of legal recognition for the free exercise of religion, the manner in which the fundamental right to freedom of thought, conscience, and religion has been understood in the modern European context is not one by which those currently influential within the Holy See appear to set store.⁹⁶ The case law of the European Court of Human Rights is to the effect that ECHR article 9 neither protects religious doctrine as such, nor upholds the legal status historically given to any particular religious establishment, but rather that article 9 protects the individual's freedom to hold and practice a religion in a manner consistent with a tolerant and pluralist democracy and with due respect for others' rights. Hence, not every strong religiously-based feeling, opinion, or judgment is protected under article 9. A value judgment is, to some degree, made by civil authorities as to which convictions—even religiously-based ones—may properly claim the protection of the Convention in the European states to which it pertains. The religious and philosophical convictions thus protected are to be distinguished from prejudices (for example, that of anti-Semitism) which, however deeply held and “religiously” based, are regarded as incompatible with respect for human dignity and therefore as unworthy of respect in a democratic society. In her mono-

94. This text, taken from the first preamble and article 2(1) of the Treaty on European Union, is given here as amended by the 2007 Lisbon Reform Treaty.

95. The Vatican II *Declaration on Religious Freedom*, promulgated by Pope Paul VI in 1965, www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html (accessed November 5, 2008), states: “In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in a manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious. . . . Injury therefore is done to the human person and to the very order established by God for human life, if the free exercise of religion is denied in society, provided just public order is observed.”

96. In a doctrinal note, “On Some Questions regarding the Participation of Catholics in Political Life” (2002),

www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html (accessed November 5, 2008), the Congregation for the Doctrine of the Faith stated (at para. 8):

The right to freedom of conscience and, in a special way, to religious freedom, taught in the Declaration *Dignitatis Humanae* of the Second Vatican Council, is based on the ontological dignity of the human person and not on a non-existent equality among religions or cultural systems of human creation. Reflecting on this question, Paul VI taught that “in no way does the Council base this right to religious freedom on the fact that all religions and all teachings, including those that are erroneous, would have more or less equal value; it is based rather on the dignity of the human person, which demands that he not be subjected to external limitations which tend to constrain the conscience in its search for the true religion or in adhering to it.”

graph *Freedom of Religion under the European Convention of Human Rights*, Carolyn Evans reached this conclusion about the protections of article 9:

While freedom of religion or belief is an important right, the free practice of religion or belief should sometimes be limited. Even if the believer claims an absolute and divinely mandated obligation to behave in a particular manner, it does not follow that the State or human rights bodies should support those claims. Religions or groups of believers may be involved in stirring up hatred against people who do not share their beliefs and they may actively oppose the notion of religious freedom. *Religions have also tended historically to discriminate against women and some religions have been involved in promotion of notions of racial inequality and inciting persecution against homosexuals.*⁹⁷

This kind of interpretation of the right to religious freedom is viewed by some in the Vatican as a disguised attack on religion, and they rush to claim victim status for Catholic Christianity, battered, as they see it, by intolerant secularism. Thus, curial documents have claimed that

even in democratic societies, there still remain expressions of secular intolerance that are hostile to granting any kind of political or cultural relevance to religious faiths. Such intolerance seeks to exclude the activity of Christians from the social and political spheres because Christians strive to uphold the truths taught by the Church and are obedient to the moral duty to act in accord with their consciences.⁹⁸

Moreover, the Vatican wants to claim, “the marginalisation of Christianity . . . would threaten the very spiritual and cultural foundations of civilisation.”⁹⁹ But what the values of European democratic states would appear to demand is tolerance of the tolerant and, by corollary, intolerance of the intolerant. This position is not an instance of “Christianophobia,” anticlericalism, or “militant secularism.”¹⁰⁰ Rather, the problem is that the church has introduced a fundamental tension into any democratic polity in which conforming Catholics participate. The church has asserted its right to deny the validity of democratically enacted laws and has instructed Catholics, where possible, to block or impede their implementation.

97. Carolyn Evans, *Freedom of Religion under the European Convention of Human Rights* (Oxford: Oxford University Press, 2001), 206.

98. *Compendium of the Social Doctrine of the Church*, para. 572.

99. “On Some Questions regarding the Participation of Catholics in Political Life,” para. 6.

100. Officially, the church is otherwise very much in favor of “the European project.” See Aidan O’Neill, “Archbishop Conti Hoists the EU Flag,” *Tablet* 23 (March 23, 2002): www.thetablet.co.uk/article/4465, for critical reflections on that stance.

This teaching of the church raises for democratic societies the question of *which* moral vision a Catholic in public life can be expected to implement in carrying out public duties—those of the institution in which he or she holds office, or those of the church of which he or she is a member. The distinction between the Rule of God and the Rule of Man was repeatedly emphasized by Pope John Paul II and subsequently has been stressed as well by Benedict XVI. As the former wrote in *Veritatis Splendor*:

Today, when many countries have seen the fall of ideologies which bound politics to a totalitarian conception of the world—Marxism being the foremost of these—there is no less grave a danger that the fundamental rights of the human person will be denied and that *the religious yearnings which arise in the heart of every human being will be absorbed once again into politics. This is the risk of an alliance between democracy and ethical relativism, which would remove any sure moral reference point from political and social life, and on a deeper level make the acknowledgement of truth impossible.* Indeed, “if there is no ultimate truth to guide and direct political activity, then ideas and convictions can easily be manipulated for reasons of power. *As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism*” (Encyclical Letter *Centesimus Annus* [May 1, 1991], 46: *AAS* 83 [1991], 850).¹⁰¹

The existence of positively democratic values is clearly a blind spot of the Catholic hierarchy's. The Western democracies proclaim and seek to embody the values of liberty, equality, tolerance, pluralism, and respect both for human rights and for the structures of the rule of law.

The Specifically Moral Vision of Democracy

Western democratic states are not, as some in the church hierarchy would claim, morally neutral or morally bankrupt. The post-Nuremberg democracies share a moral vision that is implicit in the following propositions:

1. that all individuals have inestimable and intrinsic worth;
2. that respect for this intrinsic worth can be translated into statements of fundamental rights;
3. that respect for these rights entails each individual's correlative obligation to respect the rights of others as equal to his or her own, and entails as well each individual's respect for the interests of the community as a whole;
4. that the interests of the community as a whole are to be determined by an electoral process under which the majority's will prevails—subject always

101. *Veritatis Splendor*, para. 101.

- to the duty of the majority to give due respect to the fundamental rights of minorities and of each individual;
5. that the creation and maintenance of a balance of respect for the rights of individuals and the interests of the community require that institutions for open discussion flourish (hence the importance accorded to freedom of speech, open and honest debate within legislatures, and the flow of information and commentary through the press, broadcasting, and the Internet);
 6. that the prevention of tyranny and abuse of power by (or in the name of) the majority, as well as the protection of the fundamental rights of minorities and individuals, entail that there should be independent and impartial courts, whose judgments are to be respected and accepted by all parties before them and especially by those entrusted with political power;
 7. that an attitude of humility, including the acceptance that one's own views are contingent on passing circumstances—an acceptance that one might be wrong and a consequent openness to persuasion of the rightness of other views—is essential in maintaining social order and civic peace;
 8. that all those who participate in civil society—and particularly those holding public office—must do so in good faith and must share those values of respect for the individual, toleration of difference, equality of treatment, and willingness to listen, upon which all the civil institutions of the society must also be based;
 9. that laws duly enacted under the democratic deliberative process, unless found—under the same process—to be unconstitutional and to violate fundamental rights of individuals, must be respected and obeyed by all parties within society, subject always to the right to continue pressing, under the same deliberative process, for change in such laws;
 10. that, given the experience of World War II and relevant findings of the Nuremberg trial judges, an individual, in rare and extreme cases, may break a duly enacted law, but only where
 - (a) the individual is seeking to prevent an action that is itself illegal under either domestic or applicable international (humanitarian) law;
 - (b) the individual's action is necessary in the sense that there is no reasonable legal alternative available to the actor (for example, because the authorities have refrained from enforcing relevant laws);
 - (c) that the individual actor can reasonably and properly expect that the actions he or she takes will be effective in impeding the illegal act; and
 - (d) that the individual's actions are marked by a fidelity to legal values, which is to say that they are proportionate, that they involve no possibility of harm or violence to individuals, and that no attempt is made to avoid detection in performing the act.

It should be said immediately that most of these propositions have their parallels in official Roman Catholic documents, including the Catechism. Civil democratic society does not differ radically from the church regarding the importance of individual rights, though the emphases of course differ.¹⁰² Both the church and civil society recognize the urgency of protecting minorities against the potential tyranny of the majority.¹⁰³ The difference between civil democratic society and the church can be formulated in either negative or positive terms. Defined negatively, civil democratic society, in comparison with the church, shows a lack of certainty or finality in the judgments made on how its substantive values are to be realized and on the requirements of the common good. Defined positively, civil democratic society differs from the church in its openness to the possibility of views alternative to those that currently hold sway and in the openness of decision making. The assumption of fallibility does not mean, as is sometimes charged, that a democratic society is therefore committed to “ethical relativism.”¹⁰⁴ Relativism is an assertion that *there exists no right answer*, while the structures of a democratic civil society exist precisely to allow for the continued search for right answers.¹⁰⁵ The difference here is not between fallible and infallible leadership. While the tendency of the church is to maintain that its moral

102. Thus, in *Centesimus Annus*, John Paul II stated (at para. 47):

it is necessary for peoples in the process of reforming their systems to give democracy an authentic and solid foundation through the explicit recognition of [human] rights. Among the most important of these rights, mention must be made of the right to life, an integral part of which is the right of the child to develop in the mother's womb from the moment of conception; the right to live in a united family and in a moral environment conducive to the growth of the child's personality; the right to develop one's intelligence and freedom in seeking and knowing the truth; the right to share in the work which makes wise use of the earth's material resources, and to derive from that work the means to support oneself and one's dependents; and the right freely to establish a family, to have and to rear children through the responsible exercise of one's sexuality. In a certain sense, the source and synthesis of these rights is religious freedom, understood as the right to live in the truth of one's faith and in conformity with one's transcendent dignity as a person.

103. Thus, the *Compendium of the Social Doctrine of the Church*, para. 169, states: “in the democratic State, where decisions are usually made by the majority of representatives elected by the people, those responsible for government are required to interpret the common good of their country not only according to the guidelines of the majority but also according to the effective good of all the members of the community, including the minority.”

104. See “A ‘Dictatorship of Relativism’? Symposium in Response to Cardinal Ratzinger's Last Homily,” *Common Knowledge* 13.2–3 (Spring–Fall 2007): 214–450.

105. Cf. Richard John Neuhaus, “Encountered by the Truth,” in *The Best of “The Public Square” — Book 2* (Grand Rapids, MI: Eerdmans, 2001), 177–79:

The dismal truth is that generations of moderns were miseducated to think that religion, and Christianity in particular, claims to be “objectively” true in a manner that eliminates the subjectivity of experience and perspective. Regrettably that miseducation was and is abetted by Christians who confuse orthodoxy with the exclusion of intellectual inquiry. In this habit of mind the truth is an object, a thing possessed, which must be assiduously protected from any thought that is not certified by Christian copyright. The alternative is to understand that truth is personal, less a matter of our possessing than of our being possessed in service to the one who is the way the truth and the life. . . . If Christians exhibited more intellectual patience, modesty, curiosity and sense of adventure, there would be fewer atheists in the world, both of the modern rationalist and post-modern irrationalist varieties. I have never met an atheist who rejects the God in whom I believe. I have met many who decline to commit intellectual suicide, and maybe spiritual suicide as well, by accepting a God proposed by Christians who claim to know more than they can possibly know.

teachings have been constant and immutable since its foundation, historians have amply shown that church authorities have effectively made doctrinal changes down the centuries—reflecting perhaps developments in wider society—on the morality of wars of conquest and the processes of colonialism, on slavery, on sex discrimination, on the rights of women, on freedom of individual conscience, on freedom of religion, on capital punishment, on usury, and on other important ethical questions.¹⁰⁶ The rock of Peter, exposed to the elements, changes perceptibly over time.

The post-Nuremberg democratic state, based as it is on the principle that the individual is an end and never a means, is, as a matter of positive law, heir to both the Christian tradition and to the Enlightenment and Kant. The claim of legal positivism that the law is simply what the powerful command, no matter what the content, has been routed. We are all natural lawyers now. What the democratic state brings to the realization of values associated with natural law (values that the church does not embrace) is the requirement of due process, the rule of law, the procedural rights of the defense in legal proceedings, and so forth. The procedures that have been incorporated into post-Nuremberg democracies have been selected to embody the ideals of natural law. These procedures are majoritarian, pluralist, and liberal. Decisions are made on the basis of majority votes of the people or their representatives. Yet, on the assumption that individuals are genuinely individual and thus differ from one another in their interests and views, all are guaranteed the right and opportunity to express, publicize, and proselytize on behalf of those views and interests—whether the regulation of abortion or the freedom to hunt foxes is at issue. Finally, the post-Nuremberg procedures have been made consistent with the right to proselytize on behalf of minority views. A public official charged with carrying out these procedures needs to possess the quality or disposition of “open-mindedness.” That term has been an object of scorn from various quarters and is badly misunderstood. Open-mindedness is not a quality of the philosophical relativist, for relativism is disbelief in objective truths or in our capacity to establish what they are. To be open-minded, in the relevant sense, is to be open to persuasion that the truths one currently affirms may not be the definitive or last word. This quality is obviously essential in civil judges. Judicial impartiality depends on the capacity to suspend one’s immediate judgment—one’s prejudgment or prejudice—and be willing to consider with an “open mind” both argument and counterargument. But even among members of the legislature and executive, the ideal (though sometimes obscured by systems of party discipline) is that they too should be independently minded, willing to hear oppositional voices and, having heard them, to deliberate and make decisions with their colleagues about present requirements of the common good. Judge Learned Hand called this the “spirit of liberty” and expressed it thus:

106. Cf. Noonan, *Church that Can and Cannot Change*.

What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.¹⁰⁷

From the viewpoint of the post-Nuremberg democratic state, it makes no sense to seek to disentangle ideas about human rights from other rights that are essential to the procedures that ensure that fundamental rights are safeguarded effectively. It is only the rules of due process and the requirements of pluralism and liberalism that render guarantees of human rights enforceable—render them more than an empty promise. In its use of the language of human rights, the church has not yet committed itself to this very particular moral and political vision. Any church teaching on the proper relationship between the civil law and the moral law needs to take into account that, from the perspective of the former, the legitimacy of any law comes not from the end it achieves but from its having passed through the democratic process and having been found, by the institutions of the state charged with this task, in accord with all fundamental rights that the state guarantees. Moreover, laws in the democratic state are not fixed and final, and its governments are not eternal. It is a democratic ideal that the law be responsive to and reflective of the community; thus there is provision for lawful change. Lawful change is brought about by using mechanisms provided: campaigns may be mounted, petitions gathered, discussions initiated in the press and the broadcasting media, legislative hearings called, members of the executive and the legislature lobbied. All of these are activities in which the church may properly and legitimately participate. Given the existence and vigor of the democratic deliberative process, it is improper and illegitimate for the church to claim that it can mandate immediate disobedience of laws that it considers in contravention of natural law. To do so threatens the integrity of a legal system that emerged in response to post-Nuremberg needs for liberalism, pluralism, majoritarianism, and procedural transparency.¹⁰⁸

107. Judge Learned Hand, “The Spirit of Liberty” (speech, “I Am an American Day” ceremony, Central Park, New York City, May 21, 1944).

108. Cf. *Gaudium et Spes*, para. 74, www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html (accessed November 5, 2008):

The people who come together in the political community are many and diverse, and they have every right to prefer divergent solutions. If the political community is not to be torn apart while everyone follows his own opinion, there must be an authority to direct the energies of all citizens toward the common good, not in a mechanical or despotic fashion, but by acting

Church authorities sometimes respond to this logic by implicitly comparing the institutions and principles of the post-Nuremberg democracies with those that permitted the Nazi Party to take power and then exercise it through the German legal system.¹⁰⁹ But, as we have seen, the German legal system from 1933 to 1945 was systematically corrupted and subordinated to tyranny, such that all who participated in it (or in public life at any level) were tainted. It was a system of, and only of, state oppression; and the only moral response was for the just to withdraw from any participation in it and, indeed, to seek to overthrow the regime—by “unlawful” or “revolutionary” means if need be—that sustained it. Nothing at all resembling this situation can reasonably be said to hold currently in the legal systems of Western democracies. But if that is indeed the church’s assessment of systems that permit abortion and euthanasia, then the only option is for the church to instruct its members to withdraw wholly from participation in the public life of these societies. John Paul II, however, in most of his remarks, seemed to take the more balanced view that, while most laws in Western democracies were aimed at the common good, others (notably those respecting human life) failed to achieve that standard. If the church in this way accepts the overall legitimacy of Western democracies, then it cannot call for revolt against the system as a whole.¹¹⁰ Its one reasonable and consistent option is, then, to promote change in specific laws by engaging in public debate. As one Jesuit commentator has put it:

above all as a moral force which appeals to each one’s freedom and sense of responsibility. It is clear, therefore, that the political community and public authority are founded on human nature and hence belong to the order designed by God, even though the choice of a political regime and the appointment of rulers are left to the free will of citizens. It follows also that political authority, both in the community as such and in the representative bodies of the state, must always be exercised within the limits of the moral order and directed toward the common good—with a dynamic concept of that good—according to the juridical order legitimately established or due to be established. When authority is so exercised, citizens are bound in conscience to obey. Accordingly, the responsibility, dignity and importance of leaders are indeed clear. But where citizens are oppressed by a public authority overstepping its competence, they should not protest against those things which are objectively required for the common good; but it is legitimate for them to defend their own rights and the rights of their fellow citizens against the abuse of this authority, while keeping within those limits drawn by the natural law and the Gospels.

109. See Archbishop Raymond L. Burke, “On Our Civic Responsibility for the Common Good” (2004), paras. 2–3, www.stlreview.com/abpcolumn.php?abpid=7051 (accessed November 5, 2008):

some months ago . . . another native of Germany, who grew up during the Third Reich commented to me on the accusation made against a number of Catholic bishops of Germany of the time of not having done enough to teach against the evils of Nazism. . . . I think how much weightier the individual responsibility for the common good is in a democratic republic like our own nation, in which we elect the officials of our Government. As a Bishop I think of the tremendous responsibility which is mine to teach clearly the moral law to all the faithful so that, in turn, we all have a clear understanding of our civic responsibility for the common good.

110. The *Catechism of the Catholic Church* makes the following assertions at paras. 2242–43:

When citizens are under the oppression of a public authority which oversteps its competence, they should still not refuse to give or to do what is objectively demanded of them by the common good; but *it is legitimate for them to defend their own rights and those of their fellow citizens against the abuse of this authority within the limits of the natural law and the Law of the Gospel*. Armed resistance to oppression by political authority is not legitimate, unless all the following conditions are met: 1) there is certain, grave,

The willingness to subject the civil law and public policy to moral critique within ecumenical political dialogue must constitute the heart of the doctrine of the necessary conformity of the moral law and the civil law in a pluralistic society. That doctrine can be most fruitfully understood as a call *for critical moral reflection on contemporary standards of civil law, rather than as a dogmatic insistence on the imposition of Christian morality on a religiously pluralistic society.*¹¹¹

City of God v. City of Man?

The main problem with the political ideas of rigorists like Archbishop Burke is that, while they would accept that individuals have an extensive list of fundamental rights that must be respected,¹¹² the rigorists' basic orientation is theocratic or, in their terminology, theonomic.¹¹³ Despite arguments made by John Paul II in favor of an "authentically free political order," we are often reminded by the hierarchy that, since the church is not a democracy, it is not essential that civil society should be so.¹¹⁴ Because the truth is known to, and will be taught by, the church—and because the spreading of erroneous views is likely to cause harm—there is no reason, on this theocratic vision, for structural importance to be ascribed to the freedom of speech. Free speech can serve, indeed, as a medium

and prolonged violation of fundamental rights; 2) all other means of redress have been exhausted; 3) such resistance will not provoke worse disorders; 4) there is well-founded hope of success; and 5) it is impossible reasonably to foresee any better solution.

111. Gregory Kalscheur, SJ, "John Paul II, John Courtney Murray, and the Relationship between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism," *Journal of Catholic Social Thought* 231 (Summer 2004): 231–75, at 268.

112. *Gaudium et Spes*, article 27:

All offences against life itself, such as every kind of murder, genocide, abortion, euthanasia and willful suicide; all violations of the integrity of the human person, such as mutilation, physical and mental torture, undue psychological pressures; all offences against human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution, the selling of women and children, degrading working conditions where men are treated as mere tools for profit rather than free and responsible persons; all these and the like are certainly criminal: they poison human society; and they do more harm to those who practice them than those who suffer from the injury. Moreover, they are a supreme dishonour to the Creator.

113. See John Paul II, *Veritatis Splendor*, para. 41:

Others speak, and rightly so, of "theonomy," or "participated theonomy," since man's free obedience to God's law effectively implies that human reason and human will participate in God's wisdom and providence. By forbidding man to "eat of the tree of the knowledge of good and evil," God makes it clear that man does not originally possess such "knowledge" as something properly his own, but only participates in it by the light of natural reason and of Divine Revelation, which manifest to him the requirements and the promptings of eternal wisdom. Law must therefore be considered an expression of divine wisdom: by submitting to the law, freedom submits to the truth of creation. Consequently one must acknowledge in the freedom of the human person the image and the nearness of God, who is present in all (cf. Eph 4:6). But one must likewise acknowledge the majesty of the God of the universe and revere the holiness of the law of God, who is infinitely transcendent: "*Deus semper maior.*"

114. Compare, however, John Paul II, *Centesimus Annus*, para. 29: "In the totalitarian and authoritarian regimes, the principle that force predominates over reason was carried to the extreme. Man was compelled to submit to a conception of reality imposed on him by coercion, and not reached by virtue of his own reason and the exercise

of temptation: citizens are tempted (in the words of the Catechism) “to prefer their own judgment and reject authoritative teachings.”¹¹⁵ In a theocracy of the kind envisioned, laws draw their legitimacy not from consent of the people but from conformity with natural law.¹¹⁶ Thus, no respect is due intrinsically to electoral, legislative, and judicial procedures. Thus are Catholic voters told that voting for a particular candidate would be sinful and incompatible with their continued full participation in the life of the church. Thus are Catholic members of democratic legislatures instructed to disregard the views of the people who elected them to office and to use their office instead to promote church-approved legislation.¹¹⁷ Thus are Catholic members of the judiciary expected to use their offices not to protect and uphold the values of the constitution and laws of the state, but rather to decide cases in accordance with the dictates of natural law, as explained by bishops. And thus are Catholic heads of government told they are not answerable to their people but rather to God and his church. The idea that civic magistrates and leaders of the people hold office contingent on their adherence to the requirements of the godly is a model of church-state relations known outside of Catholic Christendom. It was developed as well in the Reformed tradition by Calvin and his followers in sixteenth-century Geneva and seventeenth-century Scotland. It is also the model of radical Islamists today.

If the rigorist bishops are correct that Catholicism entails theocracy, then it would seem that the post-Reformation British state—in laws that extended to its colonies in North America—got it right in seeking to exclude Catholics from public office.¹¹⁸ If a Catholic is to be a servant of the church, it was reasoned (perhaps rightly), then he cannot be a servant of the state. Catholic emancipation from the nineteenth century onward in the United Kingdom, and the gradual admission of Catholics to the franchise, to the universities, and to the great offices

of his own freedom. This principle must be overturned and total recognition must be given to the rights of the human conscience, which is bound only to the truth, both natural and revealed. The recognition of these rights represents the primary foundation of every authentically free political order.”

115. The *Catechism of the Catholic Church*, para. 1783, states: “Conscience must be informed and moral judgment enlightened. A well-informed conscience is upright and truthful. It formulates its judgment according to reason, in conformity with the true good willed by the wisdom of the Creator. The education of conscience is indispensable for human beings who are subjected to negative influences and tempted by sin to prefer their own judgment and reject authoritative teachings.”

116. See *Evangelium Vitae*, n.62d: “No circumstances, no purpose, no law whatsoever can make licit an act which is intrinsically illicit, since it is contrary to the law of God

which is written in every human heart, knowable by reason itself and proclaimed by the Church.”

117. Thus Archbishop Raymond L. Burke, “On the Dignity of Human Life and Civic Responsibility” (2003), www.wf-f.org/Burke-Life-CivicRespons.html (accessed November 6, 2008) states: “Catholic politicians have the responsibility to work against an unjust law, even when a majority of the electorate supports it. When Catholic politicians cannot immediately overturn an unjust law, they must never cease to work toward that end. At the very least, they must limit, as much as possible, the evil caused by the unjust law.”

118. For an account of the penal laws against Catholics holding public office in the British state (and its colonies), see www.newadvent.org/cathen/11611c.htm (accessed November 6, 2008).

of state in that country (now excepting only the crowned head of state), would appear to have been a major constitutional error. Can the theocratic vision of (or for) the church be reconciled with the democratic vision of the liberal pluralist state? At first glance, it would seem not. For the church, authority and legitimacy come from above, God revealing his laws through his church to the obedient and faithful. The democratic vision is, by contrast, one in which authority and legitimacy come from below: the people decide on the content of their laws, only limited and temporary authority is conferred on those chosen to lead them, and “the voice of the people is the voice of God.”

The bishops, unlike post-Nuremberg democrats, implicitly understand laws as commands. A law tells you what to do or not do, and the failure to obey entails punishment. Law is directed by a superior to a subordinate, and backed by threats. We may call this the “big stick theory” of legal obligation. In claiming that their prescriptions as to what we ought to do must outweigh the individual’s obligations under civil law, the bishops appear to be offering a “bigger stick theory”: obey your bishop’s prescriptions or else place yourself “outside full communion with the Church and so jeopardize your Eternal salvation.” These last words are those of Bishop Michael Sheridan, whose model for governance is dualist, indeed almost Manichean. On the one hand, you have the command of the state; on the other hand, you have the commands of God (as mediated through his church), which trump human laws. On the one hand, you are a citizen of the state; on the other hand, you are a citizen of the kingdom of God, to which greater loyalty is due (“we must obey God rather than men”).¹¹⁹ On the one hand, you are a servant of the state; on the other hand, you are a servant of God, but “no-one can serve two Masters: he will either hate the first and love the second, or treat the first with respect and the second with scorn. You cannot serve both God and Mammon.”¹²⁰ On the one hand, you may be punished by the state, even unto death, for disobeying its laws; on the other hand, far greater—indeed, eternal—punishment will come the way of those who disobey the law of God.

A possible resolution of this “two masters” problem would be for the state to nationalize the church and assert the authority of the secular arm over the spiritual. The state’s legislature would legislate also for the church, the government of the state would make episcopal appointments, and the head of state would assume the role of supreme governor of the church. This model, of course, was effectively followed in the case of the Church of England and also of the Lutheran state churches of Scandinavia. It is not a model that works so readily with a supranational body such as the Roman Catholic Church. And there are less disruptive ways out of this impasse. A proper understanding and presentation

119. Acts 5:29.

120. Matthew 6:24.

of the church's traditional Aristotelian-Thomist teaching on natural law—that moral prescriptions are objectively based and may be discerned by all people of goodwill, reflecting on what it is to be human—may be the best place to start.¹²¹ In Catholic teaching, the requirements of moral action are not necessarily to be based on church dogma or divine revelation. The requirements of moral action can and should be established by reason.¹²² To reason is to engage in discourse, to argue, to debate, to consider. The old model of law-as-command need not inflect pronouncements on natural law.¹²³ If we take seriously the church's reference to (and reliance upon) natural law as an appeal to the rational nature of all human beings, then it may be interpreted as an invitation to everyone, inside and outside the church, to enter into that discussion and to seek in it the right answers.¹²⁴

The church has made fitful moves in this direction. On the fifth anniversary of *Evangelium Vitae*, John Paul II made remarks that appear to indicate his acceptance that the church should do more than insist on change in civil and criminal laws that fail to conform to Catholic teaching on the right to life.¹²⁵ There must, he said, be a general campaign for hearts and minds: “*The changing*

121. This position was taken as well by Hugo Grotius, father of international law (and an Arminian Calvinist). See the “Prolegomenon” to his *De Iure Belli ac Pacis* (1625).

122. See James Alison, *On Being Liked* (London: Darton, Longman, and Todd, 2003), 95: “natural law is the way verifiability challenges metaphysical a prioris, and this saves our Church from becoming a sacred sect, defined by bizarre and anti-rational taboos.”

123. See Thomas Shaffer, “Jurisprudence in the Light of Hebraic Faith,” *Journal of Law, Ethics and Public Policy* 1 (1984): 77–115, at 87: “When natural law measures positive law, natural law is likely to take the form of positive law. How else are the two to be compared? This way of thinking leads towards codification of natural law—statements of it in hornbook form. And of course hornbooks have authors: they have institutional authorities who promulgate and enforce them. And the institutional authority which stands behind these codifications of natural law can become a god. There are examples of this in . . . Roman Catholic moral theology.”

124. There are, however, some indications in the later writings of John Paul II of a retreat from this teaching, in favor of the impregnable certainty of revelation. Thus, in *Veritatis Splendor*, at para. 36, 44, he states:

In response to the encouragement of the Second Vatican Council (cf. Pastoral Constitution on the Church in the Modern World *Gaudium et Spes*, articles 40 and

43) there has been a desire to foster dialogue with modern culture, emphasizing the rational “and thus universally understandable and communicable” character of moral norms belonging to the sphere of the natural moral law. (Cf. Saint Thomas Aquinas, *Summa Theologica* I–II, q. 71, a. 6; see also ad sum.) There has also been an attempt to reaffirm the interior character of the ethical requirements deriving from that law, requirements which create an obligation for the will only because such an obligation was previously acknowledged by human reason and, concretely, by personal conscience. Some people, however, disregarding the dependence of human reason on Divine Wisdom and the need, given the present state of fallen nature, for Divine Revelation as an effective means for knowing moral truths, even those of the natural order (Cf. Pius XII, Encyclical Letter *Humani Generis* [August 12, 1950], www.vatican.va/holy_father/pius_xii/encyclicals/documents/hf_p-xii_enc_12081950_humani-generis_en.html: AAS 42 [1950], 561–562), have actually posited a complete sovereignty of reason in the domain of moral norms regarding the right ordering of life in this world. . . . Man is able to recognize good and evil thanks to that discernment of good from evil which he himself carries out by his reason, in particular by his reason enlightened by Divine Revelation and by faith, through the law which God gave to the Chosen People.

125. See *Evangelium Vitae*, para. 90: “it is not enough to remove unjust laws. The underlying causes of attacks on

of laws must be preceded and accompanied by the changing of mentalities and morals on a vast scale, in an extensive and visible way. In this area the Church will spare no effort, nor can she accept negligence or guilty silence."¹²⁶ The late pope, at least, seems to have recognized that reliance, in a democratic context, on canonical authority to issue instructions and threaten sanctions had been turning abortion and euthanasia into sectarian issues peculiar to the church discipline of Catholicism. Whereas Catholic moral tradition has it that these are questions to which all persons of goodwill, guided by the light of reason (rather than revelation), will come to see the objectively right answers. A further, perhaps more difficult step for the church would be to recognize that the democratic process has a moral weight in and of itself, given that it embodies the idea of the individual's inestimable worth and dignity, and seeks to reconcile individual conscience with the interests of the community. Again, at least the late pope accepted in principle that the democratically mandated processes under which matters in dispute are resolved deserve the respect of the church. As he noted in his 1991 encyclical *Centesimus Annus*:

The Church values the democratic system inasmuch as it ensures the participation of citizens in making political choices, guarantees to the governed the possibility both of electing and holding accountable those who govern them, and of replacing them through peaceful means when appropriate. *Thus she cannot encourage the formation of narrow ruling groups which usurp the power of the State for individual interests or for ideological ends.* Authentic democracy is possible only in a State ruled by law, and on the basis of a correct conception of the human person. (para. 46)

The Primacy of Conscience

A key step toward resolving the conflict of claims of the spiritual and secular worlds would be for the church to abandon the figural language of "masters" and "servants." For even if claims are made on the individual and commands issued, it is the individual who must act and take responsibility for his or her action (or inaction). We are driven inexorably back to the question of individual conscience.

life have to be eliminated, especially by ensuring proper support for families and motherhood. A family policy must be the basis and driving force of all social policies. For this reason there need to be set in place social and political initiatives capable of guaranteeing conditions of true freedom of choice in matters of parenthood. It is also necessary to rethink labor, urban, residential and social service policies so as to harmonize working schedules with time available for the family, so that it becomes effectively possible to take care of children and the elderly."

126. Pope John Paul II, "Civil Law, Morality, and the Right to Life" (address at the commemoration of the fifth anniversary of *Evangelium Vitae* in 2000), para. 6, www.vatican.va/holy_father/john_paul_ii/speeches/documents/hf_jp-ii_spe_20000214_acd-life_en.html (accessed November 6, 2008).

Traditional Catholic moral teaching holds that individuals must be accorded the right and freedom to act in accordance with the dictates of their conscience and to be free to make a positive decision to do good and avoid evil.¹²⁷ The whole history of salvation is predicated on free will and the individual making choices. The church has also taught that individuals have an obligation to inform their consciences as to what is objectively the right thing to do.¹²⁸ But the discussion of the place of individual conscience in determining moral action seems bedeviled by failure to distinguish between the undoubted duty to *inform* one's conscience and the much more problematic question of whether an individual can properly be required to *conform* his or her conscience and acts to the demands or expectations of others.

Being a Catholic does not mean the abdication of moral responsibility for one's own acts. One is expected to have regard for authoritative texts of the tradition, including Scripture, official Vatican pronouncements, and works of theologians and exegetes. The duty to inform one's conscience, however, is not confined to looking at formal church sources. Recourse may also properly be had, for example, to insights offered by the sciences, medicine, psychology, philosophy, law, logic, and experience.¹²⁹ Once the individual's conscience is responsibly informed, acting contrary to it is—so Catholic tradition advises—acting immorally. To purport to hand over one's moral responsibility to another, and to act in a given way only because told to by a bishop or pope, is to act immorally. One commits, in Kantian terms, the sin of “wilful heteronomy.”¹³⁰ As stated in *Gaudium et Spes*, the pastoral constitution (promulgated in 1965 at the Second Vatican Council) on the church in the modern world:

127. See *Catechism of the Catholic Church*, para. 1781:

Conscience enables one to assume responsibility for the acts performed. If man commits evil, the just judgment of conscience can remain within him as the witness to the universal truth of the good, at the same time as the evil of his particular choice. The verdict of the judgment of conscience remains a pledge of hope and mercy. In attesting to the fault committed, it calls to mind the forgiveness that must be asked, the good that must still be practiced, and the virtue that must be constantly cultivated with the grace of God.

128. See *Catechism of the Catholic Church*, para. 1798: “A well-formed conscience is upright and truthful. It formulates its judgments according to reason, in conformity with the true good willed by the wisdom of the Creator. Everyone must avail himself of the means to form his conscience.”

129. See, to similar effect, *Compendium of the Social Doctrine of the Church*, para. 78:

A significant contribution to the Church's social doctrine comes also from human sciences and the social

sciences. In view of that particular part of the truth that it may reveal, no branch of knowledge is excluded. The Church recognizes and receives everything that contributes to the understanding of man in the ever broader, more fluid and more complex network of his social relationships. It is aware of the fact that a profound understanding of man does not come from theology alone, without the contributions of many branches of knowledge to which theology itself refers.

130. See also *Veritatis Splendor*, para. 44:

obedience to God is not, as some would believe, a heteronomy, as if the moral life were subject to the will of something all-powerful, absolute, extraneous to man and intolerant of his freedom. If in fact a heteronomy of morality were to mean a denial of man's self-determination or the imposition of norms unrelated to his good, this would be in contradiction to the Revelation of the Covenant and of the redemptive Incarnation. Such a heteronomy would be nothing but a form of alienation, contrary to divine wisdom and to the dignity of the human person.

God willed that men and women should be left free to make their own decisions, so that they might of their own accord seek their creator and freely attain their full and blessed perfection by cleaving to God. Their dignity, therefore, requires them to act out of conscious and free choice, and *not by their own blind impulses or by external constraints.* (article 17)

One needs, further, in this context, to distinguish between an individual's deciding how to act morally and an individual's judging the morality of an action. In *Murder in the Cathedral*, T. S. Eliot has the character Thomas Becket exclaim that the "greatest treason" would be "to do the right thing for the wrong reason." If you act contrary to your conscience ("in bad faith"), you act immorally *no matter what you do*.¹³¹ However, in Catholic tradition—as indeed in any moral philosophy aspiring to be nonrelativistic—acting in accordance with conscience is not sufficient to establish that an action should be judged (objectively) moral: one may well do the wrong thing for the right reason.¹³² To be moral, an act that is consonant with individual conscience must also be consonant with objective values. In other words, one can be judged to have acted morally only if one does the right thing for the right reason. The obligation to inform one's conscience exists to ensure that one does not fall into "moral perplexity," a situation in which, no matter what one does, one does wrong.

As moral agents, we seek congruence between the subjective demands of conscience and the objective requirements of the good life, referred to in the Thomist tradition as "natural law." Natural law, however, cannot be defined or confined by the terms of documents emanating from authorities of the church. Instead, as Aquinas put it, natural law is "written in the hearts of mankind."¹³³ It is humanity's seeking—through reason and intellect—to discover the natural grammar of conduct that determines how our individual lives may be rightly ordered. What Aquinas was describing in writing of natural law was an orientation or predisposition in relation to some general and axiomatic (*per se nota*) and obvious natural human desires. He was not seeking to read off specific principles of right conduct from his views on what was natural to humanity. In theologi-

131. See *Catechism of the Catholic Church*, para. 1790: "A human being must always obey the certain judgment of his conscience. If he were deliberately to act against it, he would condemn himself."

132. As is noted by John Paul II in *Veritatis Splendor*, para. 32:

Certain currents of modern thought have gone so far as to exalt freedom to such an extent that it becomes an absolute, which would then be the source of values. . . . The individual conscience is accorded the status of a supreme tribunal of moral judgment which hands

down categorical and infallible decisions about good and evil. To the affirmation that one has a duty to follow one's conscience is unduly added the affirmation that one's moral judgment is true merely by the fact that it has its origin in the conscience. But in this way the inescapable claims of truth disappear, yielding their place to a criterion of sincerity, authenticity and "being at peace with oneself," so much so that some have come to adopt a radically subjectivistic conception of moral judgment.

133. Aquinas, *Summa Theologiae* Ia-IIae, q. 94, a. 6.

cal terms, natural law regards action done in conformity with our God-given rational natures and in conformity with divine providence. Thus, natural law is realized not in the formulation of rules or precepts but in prudent and responsible acts.¹³⁴

As individual moral agents, we each have to make decisions on what to do—and whom to vote for—ourselves. As John Henry Cardinal Newman argued:

Conscience is not a judgment upon any speculative truth, any abstract doctrine, but bears immediately on conduct, on something to be done or not done. “Conscience,” says St. Thomas, “is the practical judgment or dictate of reason, by which we judge what *hic et nunc* is to be done as being good, or to be avoided as evil.” . . . Conscience being a practical dictate, a collision is possible between it and the Pope’s authority only when the Pope legislates, or gives particular orders, and the like. *But a Pope is not infallible in his laws, nor in his commands, nor in his acts of State, nor in his administration, nor in his public policy. Let it be observed that the [First] Vatican Council has left him just as it found him here. . . . Since then infallibility alone could block the exercise of conscience, and the Pope is not infallible in that subject-matter in which conscience is of supreme authority, no deadlock . . . can take place between conscience and the Pope. . . .* its dictate, in order to prevail against the voice of the Pope, must follow upon serious thought, prayer, and all available means of arriving at a right judgment on the matter in question. . . . Cardinal Gousset has adduced from the Fourth Lateran [Council]; that “He who acts against his conscience loses his soul.” . . . Of course, if a man is culpable in being in error, which he might have escaped, had he been more in earnest, for that error he is answerable to God, but still he must act according to that error, while he is in it, because he in full sincerity thinks the error to be truth. . . . I add one remark. Certainly, if I am obliged to bring religion into after-dinner toasts, (which indeed does not seem quite the thing) I shall drink “the Pope,” if you please, still, “to Conscience first, and to the Pope afterwards.”¹³⁵

Each of us, the church emphasizes, will ultimately be answerable in divine judgment for the acts we ourselves do and the inaction for which we are responsible. As John Paul II stated in *Evangelium Vitae* (at para. 74): “Each individual in fact

134. See, on this point, Nicholas Lash, “Natural Law” (paper presented to the “D” Society, Cambridge University, January 26, 1979).

135. John Henry Newman, letter to the Duke of Norfolk (1874), sec. 5, www.newmanreader.org/works/anglicans/volume2/gladstone/section5.html (accessed November 6, 2008). In *Veritatis Splendor*, para. 33, John Paul II refers to Cardinal Newman as an “outstanding defender of the rights of conscience” and quotes approvingly from Newman’s letter to Norfolk.

has moral responsibility for the acts which he personally performs; no one can be exempted from this responsibility, and on the basis of it everyone will be judged by God himself (cf. Rom. 2:6; 14:12).”

Humility and the Hierarchy

The Congregation for the Doctrine of the Faith, in its communication of 2003 against proposals for the legal recognition of same-sex unions, acknowledged the primary importance of individual conscience by suggesting the existence of a right (or indeed, in some circumstances, a duty) of “conscientious objection” to civil laws.¹³⁶ Of necessity, that same right of informed conscientious objection must be conceded within the institutional church if the baptized are to remain moral agents. As then-Father Joseph Ratzinger commented on article 16 of *Gaudium et Spes*:

For Newman, conscience represents the inner complement and limit of Church principle. Over the Pope as the expression of the binding claim of ecclesiastical authority, there still stands one’s own conscience, *which must be obeyed before all else, even if necessary against the requirements of ecclesiastical authority*. This emphasis on the individual, whose conscience confronts him with a supreme and ultimate tribunal, and one in which the last resort is beyond the claim of external social groups, *even of the official Church, also establishes a principle in opposition to increasing totalitarianism*. . . . Conscience is made the principle of objectivity, in the conviction that careful attention to its claim discloses the fundamental common values of human existence. . . . Above all, however, conscience is presented as the meeting point and common ground of Christians and non-Christians and consequently as the real hinge on which dialogue turns. *Fidelity to conscience unites Christians and non-Christians and permits them to work together to solve the moral tasks of mankind, just as it compels them both to humble and open inquiry into the truth*.¹³⁷

Thus, pronouncements of the Congregation for the Doctrine of the Faith are relevant to, but certainly not determinative on, questions as to how a Catholic

136. See “Considerations regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons,” para. 5:

Those who would move from tolerance to the legitimization of specific rights for cohabiting homosexual persons need to be reminded that the approval or legalization of evil is something far different from the toleration of evil. In those situations where homosexual unions have been legally recognized or have been given the legal status and rights belonging to mar-

riage, clear and emphatic opposition is a duty. One must refrain from any kind of formal cooperation in the enactment or application of such gravely unjust laws and, as far as possible, from material cooperation on the level of their application. In this area, everyone can exercise the right to conscientious objection.

137. Joseph Ratzinger, “The Dignity of the Human Person,” in vol. 5 of *Commentary on the Doctrine of Vatican II*, ed. Herbert Vorgrimler (New York: Herder and Herder, 1967), 134–36.

may live a life faithful to Christian moral values. One of the great problems with the way in which church authorities talk about natural law is its deductive certainty, its apriorism, its nonverifiability and nonfalsifiability, its antiempiricism. For example, the much-repeated assertion that it is “not possible” for homosexuals to find fulfilment, complementarity, or happiness within a same-sex partnership goes unnuanced despite testimony from individuals who live the life. Such testimony is dismissed as false consciousness. “The experience was only a dream, as that which should not be can not be so,” as Joseph Ratzinger might reason.¹³⁸

But if the bishops are going to take seriously both the traditional Catholic teaching on the primacy of individual conscience and that on the universal discernibility of natural law, then they are going to have to

1. allow that individuals may, in conscience, differ as to what moral action demands of them in any particular circumstance;
2. allow that questions regarding how best to legislate in or regulate areas of moral dispute or controversy—where people of goodwill reach contrary positions—are questions for the prudential judgment of elected legislators rather than for ex cathedra pronouncements of the church;¹³⁹
3. be willing to listen and to engage in dialogue, in both the context of civil society and the context of the church, without resorting to ecclesiastical sanctions or the threat of sanctions;
4. seek to persuade by the authority of their reasoning rather than to command obedience by reason of their authority; and
5. be willing to accept that they may themselves get it wrong.¹⁴⁰

In sum, the bishops need to be humble enough to listen to and trust the people (of God).¹⁴¹ As the Irish moral theologian Father Seán Fagan has put it:

138. See Die unmögliche Tatsache by Morgenstern (translation by Max Knight):

And he comes to the conclusion:
His mishap was an illusion,
for, he reasons pointedly,
that which must not, can not be.

139. Compare Aquinas, *Summa Theologiae* Ia-IIae, q. 96, a. 2:

laws should be appointed to men according to their condition; St. Isidore remarks how law should be possible both according to nature and the custom of the country. Law is laid down for a great number of people, of which the majority have no higher standard of morality. Therefore it does not forbid all the vices, from which upright men can keep away. But only those grave ones which the average man can avoid, and

chiefly those which do harm to others and which have to be stopped if human society is to be maintained, such as murder and theft and so forth.

140. See Alison, *Being Liked*, xiv: “We have yet to develop a courteous and rational discourse about the fallibility of the Church. Infallibility makes no sense at all unless it is a very particular sort of exception in a massive sea of fallibility and there is a realistic way of telling the difference between the two.”

141. See Augustine’s discourse, “Against the Pagans,” trans. Edmund Hill, in *Complete Works of Saint Augustine*, vol. 3, bk. 11 (*Sermons Discovered since 1990*), 220, para. 52:

Parmenian, who was once a bishop of the Donatists, had the audacity to state in one of his letters that the bishop is the mediator between the people and God.

The Church is not made up of two separate sections, one teaching and the other learning. In fact, the whole Church is a learning Church (including Pope and bishops), a community of believers in which we must listen to each and learn from each other. At the same time the whole Church is a teaching Church in so far as every mature Christian has, at some time or other, to play the role of teacher, *magister*.¹⁴²

If adopted, the approach that Fr. Fagan recommends would get us beyond the seemingly radical incompatibility of the principles held by the church and those held by the democratic state. Both church and state would seek to protect individual liberty of conscience, freedom of speech, equality of treatment, tolerance, and pluralism. Both would value the process of dialogue among exponents of differing views and regard that process as necessary if the common good is to be discerned and then pursued. A step toward this stance was taken by *Gaudium et Spes*:

The laity should not imagine that their pastors are always experts, that to every problem which arises, however complicated, they can readily give a concrete solution, or even that such is their mission. Rather, enlightened by Christian wisdom and giving close attention to the teaching authority of the Church, the laity need take on their own distinctive role. Often enough the Christian view of things will itself suggest some specific solution in certain circumstances. Yet it happens rather frequently, and legitimately so, that with equal sincerity some of the faithful will disagree with others on a given matter. Even against the intentions of their proponents, however, solutions proposed on one side or another may be easily confused by many people with the Gospel message. Hence it is necessary for people to remember that no one is allowed in the aforementioned situations to appropriate the Church's

You can see that they are putting themselves forward in the place of the bridegroom [Christ]; they are corrupting the souls of others with a sacrilegious adultery. This is no mean case of presumption, one that would strike me as totally incredible had I not read it! You see, if the bishop is the mediator between the people and God, it follows that there must be many mediators since there are many bishops. So then in order to read the letter of Parmenian let us censor the letter of the apostle Paul, where he says "For there is one God, and one mediator of God and men, the man Christ Jesus" (1 Timothy 2:5). But between whom is he the mediator, if not between God and his people? So between God and his body, because the Church is his body. Truly monstrous, therefore, is that pride which has the audacity to set up the bishop as mediator, guilty of the adulterous fallacy of claiming for itself the marriage of Christ.

142. Fr. Seán Fagan, SM, *Does Morality Change?* (Dublin: Columba Press, 2003), 18. See also *Compendium of the Social Doctrine of the Church*, para. 79:

The social doctrine belongs to the Church because the Church is the subject that formulates it, disseminates it and teaches it. It is not a prerogative of a certain component of the ecclesial body, but of the entire community. It is the expression of the way that the Church understands society and of her position regarding social structures and changes. The whole of the Church community—priests, religious and laity—participates in the formulation of this social doctrine, each according to the different tasks, charisms and ministries found within her.

authority for his opinion. They should always try to enlighten one another through honest discussion, preserving mutual charity and caring above all for the common good.¹⁴³

The model for church-state (and cleric-laity) relations that these changes in attitude would entail should require that neither church nor state claim superiority over the other. Members of the church should participate fully in public life, while the institutional church should impose a self-denying ordinance—out of respect for the obligations involved in civil society and the duties of public office—to refrain from instructing the laity as to how specifically they must exercise their responsibilities as voters or carry out their duties as holders of public office. As *Gaudium et Spes* makes clear:

All citizens, therefore, should be mindful of the right and also the duty to use their *free* vote to further the common good. *The Church praises and esteems the work of those who for the good of men devote themselves to the service of the State and take on the burdens of this office. If the citizens' responsible co-operation is to produce the good results which may be expected in the normal course of political life, there must be a statute of positive law providing for a suitable division of the functions and bodies of authority and an efficient and independent system for the protection of rights.*¹⁴⁵

Such an approach, despite the steps already taken (in *Gaudium et Spes* and other texts) to establish it, would appear to require a change of heart, a conversion experience, a *metanoia*, on the part of some in the church hierarchy.¹⁴⁶ We may note in this regard the paucity of charity and of humility in Archbishop Burke's characterization of homosexual acts as "intrinsically evil" and as being in a more serious category of wrongdoing than waging war or executing convicts. But more worrisome, perhaps, have been the subtler insinuations coming, for instance, from the Congregation for the Doctrine of the Faith, whose communication on legal recognition of same-sex partnerships was issued on June 3, 2003, the "Memorial of Saint Charles Lwanga and his Companions, Martyrs." St. Charles Lwanga and his companions were executed on the orders of King Mwanga of Uganda after their conversion to Christianity and, apparently, because of their refusal to submit to the king's homosexual advances. The very dating of this document,

143. *Gaudium et Spes*, para. 43.

144. *Gaudium et Spes*, para. 75.

145. Contrast the position of John Paul II as stated in *Incarnationis Mysterium* (1998), para. 11, www.vatican.va/jubilee_2000/docs/documents/hf_jp-ii_doc_30111998_bolla-jubilee_en.html (accessed November 6, 2008): "As the successor of Peter, I ask that in this year of mercy the Church, strong in the holiness which she receives from

her Lord, should kneel before God and implore forgiveness for the past and present sins of her sons and daughters." See also *Tertio Millennio Adveniente*, www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_10111994_tertio-millennio-adveniente_en.html (accessed November 6, 2008), an apostolic letter in which John Paul II called for the church to repent for sins of the past against individuals and communities.

then, associates homosexual desire with tyranny and martyrdom. Was this dating intended to send a subliminal warning about dangers that the Holy Office sees as inherent in further social acceptance of homosexuality? Still, the document itself notes at the outset:

The present Considerations do *not* contain new doctrinal elements; they seek rather to reiterate the essential points on this question and provide *arguments drawn from reason*. . . . *Since this question relates to the natural moral law, the arguments that follow are addressed not only to those who believe in Christ, but to all persons committed to promoting and defending the common good of society.*

This document thus invites assessment of its arguments not in the light of doctrine but in that of reason. As such, it is not and cannot be the last word on its subject. Rome may have spoken, but the particular cause (the legal recognition and regulation of same-sex partnerships) is unresolved, since, after all, the relevant reforms are being proposed in democratic polities.¹⁴⁶ Rather than ending discussion of the matter, this statement of the Holy Office may mark an invitation to debate. Let us hope that this discussion and others of its kind, both within and outside the church, may be allowed to proceed in good faith, and with goodwill, in the spirit of St. Augustine, who wrote: “If I have said something reasonable, let [others] follow, not me, but reason itself.”¹⁴⁷

146. See sermon 131.X 10 (of the year 417) on John 6:53, in *Complete Works of Saint Augustine*, vol. 3, bk. 4 (*Sermons*), 342: “There have already been two councils on this matter [of the North African church—held in 416 at Carthage and Mileve in Numidia], and their decisions sent to the Apostolic See; from there rescripts have been sent back here. The case is finished.” This remark is commonly abbreviated and paraphrased as *Roma locuta est; causa finita est*. Ironically, rather than an assertion of papal primacy, as it is commonly assumed, the phrase remarks on the lim-

its of papal power. Augustine claims that Pope Zosimus had no power to revoke the excommunication of Pelagius and Caelestius, which had been pronounced by the church in North Africa and confirmed by Zosimus’s immediate predecessor in office, Pope Innocent I.

147. Sermon 162C (Dolbeau 10, Dolbeau 26, Mainz 27), *Complete Works of Saint Augustine*, vol. 3, bk. 11 (*Sermons*), 176, para. 15.