

## Introduction: The King's Good Servants: Catholics as Participants in Capital Litigation

Art C. Cody

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**INTRODUCTION:**  
**THE KING'S GOOD SERVANTS: CATHOLICS  
AS PARTICIPANTS IN CAPITAL  
LITIGATION**

ART C. CODY†

INTRODUCTION

The three-part series *Catholics and the Death Penalty* explored the fundamental question of what it means to be a Catholic lawyer, juror, or judge in the American capital litigation system. The first session focused on lawyers, offering the differing perspectives of New York State Capital Defender Kevin M. Doyle and Kings County District Attorney Charles J. Hynes. For the second session, Professor Gerald F. Uelmen explored how Catholic teachings and perspectives might inform a juror's role in a capital case. The final presentation featured the Honorable Guido Calabresi of the Second Circuit Court of Appeals who discussed his perspective on the role of Catholicism in his duties as judge. The series was not intended as a segmented debate regarding the general morality of the death penalty but rather as an exposition of the thoughts of those who take both their Catholicism and secular duties seriously.

Three central issues arose during the course of the series. First, what is the Catholic Church's teaching on the death penalty? This issue, for the most part, can be resolved by a review of the Catholic Catechism, the writings of Pope John Paul II, and the pronouncements of the United States Catholic Conference ("USCC"). The second issue, far more contentious, is the question of what doctrinal weight should be ascribed to that teaching. Lastly, more practical reflections emerged regarding how to navigate potential conflicts between Catholic teaching and one's duties in the context of the American system of capital punishment.

## I. CHURCH TEACHING

In order to understand the relationship between one's duties as a Catholic and concurrent responsibilities as an actor in the American system of capital punishment, it is essential as a threshold matter to understand the Church's position on the death penalty. While there are occasional cries for greater clarity from the Holy See,<sup>1</sup> the Church's teaching appears to consistently advocate domestic abolition.<sup>2</sup>

Of the four underlying purposes commonly associated with the American criminal justice system—deterrence, incarceration, denunciation, and rehabilitation—<sup>3</sup> the Church's focus, as articulated in John Paul II's 1995 Encyclical, *Evangelium Vitae* (*The Gospel of Life*),<sup>4</sup> is on rehabilitation, specifically the overall restoration of the offender to society. In keeping with this emphasis on the potential for redemption, the central factor of Church teaching regarding the death penalty revolves around a respect for "every life," regardless of culpability.<sup>5</sup> This factor is prospective in that it allows execution only when it is necessary

† Mr. Cody is an associate with Ostrolenk, Faber, Gerb & Soffen, LLP. He holds a Bachelor of Science in Aerospace Engineering from the United States Military Academy at West Point, a Masters Degree in Systems Management from the University of Southern California, and a Juris Doctorate from Notre Dame Law School. He is a member of the Committee on Capital Punishment of the Association of the Bar of the City of New York and was the moderator of the September 8, 2004 Catholic Lawyers and the Death Penalty Program. He expresses his gratitude to his wife Stacy and children Jennifer, Emily, Patrick, and Ryan for their support in this project and always.

<sup>1</sup> District Attorney Hynes cited the lack of an *ex cathedra* or "infallible" statement from Pope John Paul II requiring abolition. See *Catholics and the Death Penalty Panel Discussion*, 44 J. CATH. LEGAL STUD. 303, 326–27, 331 (2005); see also *infra* note 22 and accompanying text.

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[T]he teaching of the Universal Church is clear. . . . In Catholic teaching the state has the recourse to impose the death penalty . . . if this ultimate sanction is the only available means to protect society from a grave threat to human life. However, this right should not be exercised when other ways are available to punish criminals and to protect society . . . .

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *A Culture of Life and the Penalty of Death* 4 (2005).

<sup>3</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03(B)(1), at 15, § 2.03(D), at 18–19 (3d ed. 2001); see also Avery Cardinal Dulles, *Catholicism & Capital Punishment*, FIRST THINGS, April 2001, at 30, 33.

<sup>4</sup> JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* (1995) [hereinafter *EVANGELIUM VITAE*].

<sup>5</sup> "[G]reat care must be taken to respect every life, even that of criminals . . . ." *Id.* ¶ 57.

to prevent some *future* killing by the offender, regardless of the number or circumstances of the offender's *past* homicides.<sup>6</sup> This teaching implicates the Church's emphasis on restoration, both of society and of the criminal's place in that society. If such restoration is not possible due to the nature of the offense, then the focus shifts to incapacitation. As stated in *Evangelium Vitae*:

On this matter [capital punishment] there is a growing tendency, both in the Church and in civil society, to demand that it be applied in a very limited way or even that it be abolished completely. The problem must be viewed in the context of a system of penal justice ever more in line with human dignity and thus, in the end, with God's plan for man and society. The primary purpose of the punishment which society inflicts is to redress the disorder caused by the offence. Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime, as a condition for the offender to regain the exercise of his or her freedom. In this way authority also fulfils the purpose of defending public order and ensuring people's safety, while at the same time offering the offender an incentive and help to change his or her behaviour and be rehabilitated.

It is clear that, for these purposes to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not to 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.<sup>7</sup>

In January 1999, John Paul II applied this "absolute necessity" rubric specifically to the United States and found that imposition of the death penalty in this country was "both cruel and unnecessary."<sup>8</sup>

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<sup>6</sup> "No matter how heinous the crime, if society can protect itself without ending a human life, it should do so." UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *supra* note 2, at 13.

<sup>7</sup> *Id.* ¶ 56 (quotation omitted).

<sup>8</sup> Pope John Paul II, Mass in St. Louis, (Jan. 27, 1999), *quoted in* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *A Good Friday Appeal to End the Death Penalty* (1999), available at <http://www.nccbuscc.org/sdwp/national/criminal/appeal.htm>.

The USCC subsequently echoed the Pontiff's view in its April 2, 1999 *Good Friday Appeal to End the Death Penalty*.<sup>9</sup> Since this *Good Friday Appeal*, the Catholic position has consistently focused on abolition, most notably in the 2003 Catechism of the Catholic Church: "If . . . non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority *will* limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person."<sup>10</sup> Most recently, in their December, 2005 statement, *A Culture of Life and the Penalty of Death*, the USCC "reaffirm[ed] [their] common judgment that the use of the death penalty is unnecessary and unjustified in our time and circumstances."<sup>11</sup>

## II. THE WEIGHT ASCRIBED TO CHURCH TEACHING

Given the Church's advocacy of the elimination of the death penalty, the question remains: What is the doctrinal weight of these teachings—that is, what force do these teachings have on the individual Catholic? There is no consensus on this critical issue.

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<sup>9</sup> "On this Good Friday, a day when we recall our Savior's own execution, we appeal to all people of goodwill, and especially Catholics, to work to end the death penalty." UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *supra* note 8.

<sup>10</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 2267 (2d ed. 1997) (emphasis added); *see also* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* (2000) ("It is time to abandon the death penalty—not just because of what it does to those who are executed, but because of how it diminishes all of us."); Statement by Theodore Cardinal McCarrick, Archbishop of Wash., 101 Reasons to Abandon the Death Penalty (Apr. 18, 2002), <http://www.nccbuscc.org/sdwp/national/101reasons.htm>; Office of Soc. Dev. & World Peace, United States Conference of Catholic Bishops, The Innocence Protect Act (June 2002), <http://www.usccb.org/sdwp/national/backipa.htm> (supporting the Innocence Protection Act "because focusing attention and generating debate on the bill aids our efforts to move towards an end to capital punishment"); Office of Soc. Dev. & World Peace, United States Conference of Catholic Bishops, The Death Penalty (Feb. 2004), <http://www.usccb.org/sdwp/national/deathpenalty04.htm> (reciting that "end[ing] the use of the death penalty . . . is the Conference's ultimate objective"); Statement by Theodore Cardinal McCarrick, Archbishop of Wash., Catholic Campaign to End the Use of the Death Penalty (Mar. 21, 2005), <http://www.usccb.org/sdwp/national/deathpenalty/mccarrick.shtml> ("The Catholic campaign will work to *change* the debate and decisions on the use of the death penalty; building a constituency for life, not death; calling on our lawmakers to lead, not follow; to defend life, not take it away.")

<sup>11</sup> UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *supra* note 2, at 3.

Justice Antonin Scalia, in a manner consistent with his strict construction of the Constitution, argues that since the Church has long allowed the use of the death penalty as a tool of retribution, this “tradition” cannot be swept away by “a couple of paragraphs in an encyclical” or by “a latest, hot-off-the-presses version of the catechism.”<sup>12</sup> Relying on “canonical experts,” Justice Scalia postulates that although *Evangelium Vitae* must receive “thoughtful and respectful consideration,” it may be rejected by the individual Catholic.<sup>13</sup> Similarly, Justice Scalia found the “absolute necessity” restriction of the 2003 Catechism likewise does not require adherence by the individual Catholic.<sup>14</sup> While acknowledging that the Catechism purports to be the encapsulation of the Catholic faith, Justice Scalia rejected its teaching regarding the death penalty largely because it appeared to him to reject, for the first time, the principal that the death penalty can morally be used purely for retributive purposes, thus

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<sup>12</sup> Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002 17, 20–21 [hereinafter Scalia, *God's Justice and Ours*]. This article was adapted from remarks given at a conference sponsored by the Pew Forum on Religion and Public Life at the University of Chicago Divinity School held on January 25, 2002. See Justice Antonin Scalia, *Religion, Politics, & the Death Penalty*, Panel Discussion sponsored by the Pew Forum on Religion and Public Life at the University of Chicago (January 25, 2002), available at <http://pewforum.org/deathpenalty/resources/transcript3.php3> [hereinafter Scalia, *Religion, Politics, & the Death Penalty*].

<sup>13</sup> See Scalia, *God's Justice and Ours*, *supra* note 12, at 21.

I am therefore happy to learn from the canonical experts I have consulted that the position set forth in *Evangelium Vitae* and in the latest version of the Catholic catechism does not purport to be binding teaching—that is, it need not be accepted by practicing Catholics, though they must give it thoughtful and respectful consideration.

*Id.* But see UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *supra* note 2, at 15.

The Church's teaching [on capital punishment], as expressed clearly and authoritatively in the *Catechism* and the *Gospel of Life* [*Evangelium Vitae*], should not be ignored or dismissed as just one opinion among others. Rather, Catholics are called to receive this teaching seriously and faithfully as they shape their consciences, their attitudes, and ultimately their actions.

*Id.*; see also Judge Guido Calabresi, *Catholic Judges and the Death Penalty: A Conversation with the Honorable Guido Calabresi* 7 (Mar. 2005) (transcript on file with the St. John's Law Review).

Justice Scalia has suggested that anyone who takes the Pope seriously with respect to capital punishment should get off the bench. He clearly doesn't take the Pope seriously on this. He says he takes him seriously on other things. Well, if you pick and choose, well then you are a picker and a chooser. I don't believe one should.

*Id.*

<sup>14</sup> See Scalia, *God's Justice and Ours*, *supra* note 12, at 21.

defying what in his view were centuries of Church support or at least toleration of this purpose.<sup>15</sup> Not surprisingly, Justice Scalia premised his belief on the fact that, like the Constitution, the Catechism is unchanging.<sup>16</sup>

Eminent theologian Avery Cardinal Dulles takes a more nuanced view. For Cardinal Dulles, *Evangelium Vitae* and the Catechism do not sweep aside “two thousand years of Christian teaching” but rather affirm the basic Church teaching that a government in some circumstances may indeed impose the death penalty. “The doctrine remains what it has been: that the State, in principle, has the right to impose the death penalty on persons convicted of very serious crimes.”<sup>17</sup> Cardinal Dulles opines that this right of the state to execute is far from absolute and applies a utilitarian criterion. “[T]he classical tradition held that the State should not exercise this right when the evil effects outweigh the good effects.”<sup>18</sup> Cardinal Dulles perceives that John Paul II and the USCC compared the institution of the death penalty in the United States to the purposes of punishment and found in their prudential judgment that it is no longer necessary to execute criminals in the United States. The Church, according to Cardinal Dulles, is simply stating that we have now reached the historical point when executions in the United States do more harm than good and therefore should not take place.<sup>19</sup> Nothing in Church teaching has changed.

Dulles’ view, although advocating a differing result as to the moral viability of the death penalty than that advanced by Justice Scalia, supports Justice Scalia’s conclusion that the *Evangelium Vitae* and the Catechism are non-binding upon Catholics and require only that “Catholics, in seeking to form their judgment as to whether the death penalty is to be

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<sup>15</sup> See *id.* at 20 (“So I take the encyclical and the latest, hot-off-the-presses version of the catechism (a supposed encapsulation of the “deposit” of faith and the Church’s teaching regarding a moral order that does not change) to mean that retribution is not a valid purpose of capital punishment.”).

<sup>16</sup> See *id.* at 17.

<sup>17</sup> Dulles, *supra* note 3, at 35.

<sup>18</sup> *Id.*

<sup>19</sup> Justice Scalia questioned the accuracy of Cardinal Dulles’ assessment that current Church teaching still credits “retribution” as a valid justification for the death penalty. See Scalia, *God’s Justice and Ours*, *supra* note 12, at 20. Kevin M. Doyle likewise noted Cardinal Dulles’ emphasis on the precept that Church doctrine does not change over time. See *Catholics and the Death Penalty Panel Discussion*, *supra* note 1, at 328–29.

supported as a general policy, or in a given situation, should be attentive to the guidance of the Pope and the bishops."<sup>20</sup>

While Justice Scalia and Cardinal Dulles conclude that the teachings of *Evangelium Vitae* and the Catechism do not compel adherence from Catholics, there is support for the concept that even statements not made *ex cathedra* should engender more than just a requirement for "attentiveness" and "consideration." John Paul II has stated:

It has to be noted that there is a tendency on the part of some Catholics to be selective in their adherence to the Church's moral teaching. It is sometimes claimed that dissent from the magisterium is totally compatible with being a "good Catholic," and poses no obstacle to the reception of the Sacraments. This is a grave error that challenges the teaching of the Bishops in the United States and elsewhere.<sup>21</sup>

Pope John Paul II's position is supported by the declarations of Vatican II:

In matters of faith and morals . . . religious submission of mind and will must be shown in a special way to the authentic [teaching authority] of the Roman Pontiff, even when he is not speaking *ex cathedra*;<sup>22</sup> that is, it must be shown in such a way that his supreme magisterium is acknowledged with reverence, the judgments made by him are sincerely adhered to, according to his manifest mind and will. His mind and will in the matter may be known either from the character of the documents, from

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<sup>20</sup> Dulles, *supra* note 3, at 35. But see Judge Calabresi's remarks and a Culture of Life, *supra* note 13.

<sup>21</sup> Paul A. Duffner, *Cafeteria Catholics*, ROSARY LIGHT & LIFE, July-Aug. 1993 (quoting Pope John Paul II, Remarks at the Meeting with the Bishops of the United States: Our Lady Queen of the Angels Minor Seminary (Sept. 16, 1987)); see also *supra* note 13 (discussing Judge Calabresi's rejection of "picker and chooser" attitude toward adherence to Church teachings on Catholic doctrinal issues).

<sup>22</sup> Such "from-the-chair" pronouncements are extremely rare. As discussed by the First Vatican Council:

[W]e teach and define as a divinely revealed dogma that when the Roman pontiff speaks *ex cathedra*, that is, when, in the exercise of his office as shepherd and teacher of all Christians, in virtue of his supreme apostolic authority, he defines a doctrine concerning faith or morals to be held by the whole church, he possesses, by the divine assistance promised to him in blessed Peter, that infallibility which the divine Redeemer willed his church to enjoy in defining doctrine concerning faith or morals. Therefore, such definitions of the Roman pontiff are of themselves, and not by the consent of the church, irreformable.

2 DECREES OF THE ECUMENICAL COUNCILS: TRENT TO VATICAN II 816 (Norman P. Tanner S.J. ed., 1990).



his frequent repetition of the same doctrine, or from his manner of speaking.<sup>23</sup>

The argument can be further made that while the theologians cited by Justice Scalia may be learned, they do not speak with papal authority. As Thomas Aquinas stated, "We must abide rather by the Pope's judgment than by the opinion of any of the theologians, however well versed he may be in divine Scriptures."<sup>24</sup>

Ultimately, while the Church clearly advocates the position that the death penalty—at least as practiced in the United States—is "cruel and unnecessary," it appears to stop short of the position that one who furthers executions commits a grave sin. Then Cardinal Ratzinger, now Pope Benedict XVI, distinguished capital punishment from abortion and euthanasia in a July 2004 letter to Theodore Cardinal McCarrick, Archbishop of the District of Columbia:

Not all moral issues have the same moral weight as abortion and euthanasia. For example, if a Catholic were to be at odds with the Holy Father on the application of capital punishment . . . he would not for that reason be considered unworthy to present himself to receive Holy Communion. While the Church exhorts civil authorities . . . to exercise discretion and mercy in imposing punishment on criminals, it may still be permissible to take up arms to repel an aggressor or to have recourse to capital punishment. There may be a legitimate diversity of opinion even among Catholics about . . . applying

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<sup>23</sup> SECOND VATICAN COUNCIL, LUMEN GENTIUM: DOGMATIC CONSTITUTION OF THE CHURCH ¶ 25 (1964).

In addition to those doctrines which have been taught by the Magisterium of the Church in the extraordinary way of infallible definitions, the ordinary teaching of the Pope and the Bishops in union with him preserves many revealed truths which have never been solemnly defined, but which, nevertheless, are infallibly true and definable. These are truths which cannot be rejected or neglected without injury to the integrity of the Catholic faith, because they are either explicitly contained in Holy Scripture, or, although only implicit in Sacred Scripture, they have been taught universally and continually, are professed in the liturgy, and are believed and witnessed by the faithful as divinely revealed.

Duffner, *supra* note 21 (quoting the United States Conference of Catholic Bishops' Committee on Doctrine).

<sup>24</sup> *Quodl.* IX, Art. A.16, quoted in M.R. Gagnebet O.P., *The Authority of the Encyclical Humanae Vitae*, available at <http://www.ewtn.com/library/Theology/AUTHUMVT.HTM>.

the death penalty, but not however with regard to abortion and euthanasia.<sup>25</sup>

Similarly, *Evangelium Vitae* emphasizes the increased vigor with which innocent—as opposed to “guilty”—life must be protected.<sup>26</sup> Of course, the question remains how this distinction can be reconciled with the Gospel’s command that what one does for “these least brothers of mine [innocent or guilty], you d[o] for me,”<sup>27</sup> as well as Christ’s admonishment to be cautious in judgment to those about to execute an adulteress.<sup>28</sup>

Looking forward, the Church’s position on the death penalty in developed countries such as the United States may soon reach a point where a more binding statement may be made, one that reiterates the theoretical right of the state to execute, given a true inability to incapacitate, yet emphasizes that no such conditions exist in developed nations and thus actions furthering execution are grave sin. In the interim, the required level of adherence to Church teaching regarding the death penalty remains unsettled.

### III. THE KING’S GOOD SERVANTS: RECONCILING FAITH WITH CIVIC DUTY

Unwilling to support King Henry VIII’s claim to be head of the Church of England, St. Thomas More, prior to his execution, stated that he remained “the King’s good servant but God’s first.”<sup>29</sup> For those who believe that the Church’s teaching on capital punishment is ambiguous or places no obligation other than “thoughtful and respectful consideration,” it is unnecessary

<sup>25</sup> Memorandum from Cardinal Ratzinger to Cardinal McCarrick (July 2004); see also *supra* note 2, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, at 6. “People of goodwill disagree. In these reflections [on the death penalty], we offer neither judgment nor condemnation . . .” *Id.*

While we do not equate the situation of persons convicted of terrible crimes with the moral claims of innocent unborn children or the vulnerable elderly and the disabled, we are convinced that working together to end the use of the death penalty is an integral and important part of resisting a culture of death and building a true culture of life.

*Id.* at 19.

<sup>26</sup> See *EVANGELIUM VITAE*, *supra* note 4, ¶ 57 (1995) (“If such great care must be taken to respect every life, even that of criminals and unjust aggressors, the commandment ‘You shall not kill’ has absolute value when it refers to the innocent person.”).

<sup>27</sup> *Matthew* 25:40 (New American).

<sup>28</sup> *John* 8:1–11.

<sup>29</sup> R.W. CHAMBERS, *THOMAS MORE* 349 (Jonathan Cape Ltd. 1935).

to resolve any perceived conflict between the civil capital punishment law and the teaching of the Church.<sup>30</sup> On the other hand, Catholics who deem the Catechism to be of a greater moral efficacy encounter a much more nuanced scenario than that faced by St. Thomas More.

Adherence to the Church's teaching regarding the death penalty, adherence demands a choice between—or at least reconciliation of—Church and state requirements. Through the course of *Catholics and the Death Penalty*, three primary alternatives arose: resignation (District Attorney Hynes/Justice Scalia), reconciliation (Professor Uelmen), and contemplative selection (Judge Calabresi). Each is treated *seriatim* below.

#### A. Resignation

As discussed above, District Attorney Hynes personally saw no conflict between Church teaching and his duties as King's County District Attorney, primarily due to his belief that the Church's position was ambiguous, at least in part due to its failure to speak *ex cathedra* on the issue. When faced with a scenario wherein a hypothetical *ex cathedra* statement had been made condemning capital punishment, however, he felt he would be compelled to recuse himself in capital cases.<sup>31</sup> Justice Scalia suggested a similar requirement for those judges whose Catholic faith impairs their ability to mete out the death penalty: "[T]he choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted, constitutional laws and sabotaging death penalty cases."<sup>32</sup> For the adherent Catholic—presumably motivated by Church teaching to avoid execution wherever possible—such a choice involves still further issues as to the practical result of such withdrawal.<sup>33</sup>

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<sup>30</sup> See *supra* note 1 (observing absence of Papal decree requiring abolition of capital punishment); see also *supra* Part II (discussing varying personal approaches toward assigning doctrinal weight to Church teachings).

<sup>31</sup> "For me it would be very simple if the Pope said tomorrow, *ex cathedra*, 'capital punishment is wrong, it's immoral.' Then I have no problem. I recuse myself as a Catholic. . . . So that's easy for me if the Church was clear about it." *Catholics and the Death Penalty Panel Discussion*, *supra* note 1, at 327.

<sup>32</sup> Scalia, *God's Justice and Ours*, *supra* note 12, at 18.

<sup>33</sup> As Kevin M. Doyle stated:

To go back to the recusal thing that came up before, not to be overly pragmatic, but keep in mind when you recuse yourself, if you recuse

### B. Reconciliation

During *voir dire*, the Catholic prospective juror is oft met head-on with the question of his or her ability to impose death. In order to sit on a capital jury, such a juror must be able to state that, given the proper case, he or she could vote for death.<sup>34</sup> Here, Professor Uelmen suggested that a Catholic juror in such circumstances could state unequivocally that he or she could impose death. This assurance is based on the premise that the Catechism and *Evangelium Vitae* allow for the state to impose death in those situations where incapacitation is impossible. It is important to note, however, that while the Church allows for execution when there is no other way to protect society, such an exception is not universally applicable. While some states, such as Texas, do consider the “future” harm the defendant could cause,<sup>35</sup> other states’ sentencing laws look solely to the past—circumstances of the crime and the defendant—and thus future incapacitation is of no moment.<sup>36</sup> In short, the ability of the Catholic juror who seeks to adhere to the Catechism and *Evangelium Vitae* is called into question when incapacitation is not among the aggravators and mitigators.

### C. Contemplative Selection

Judge Calabresi finds the death penalty both practically and morally unjustifiable.<sup>37</sup> He also finds that he has both a

yourself because you’re not bloodthirsty enough, the guy or the gal that they are going to put in after you is going to be plenty bloodthirsty. So there is a practical aspect of this.

*Catholics and the Death Penalty Panel Discussion, supra* note 1, at 340.

<sup>34</sup> See *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968).

The most that can be demanded of a venireman . . . is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed . . . to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.

*Id.*

<sup>35</sup> See TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 2005) (providing that when the state seeks the death penalty for a defendant found guilty of a capital offense, the court submits the issues to the jury as to “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society”).

<sup>36</sup> See, e.g., ALA. CODE § 13A-5-49 (LexisNexis Supp. 2004) (listing aggravating and mitigating circumstances for capital punishment).

<sup>37</sup> See Calabresi, *supra* note 13, at 2–3 (asserting that deterrence rationale “doesn’t wash,” capital punishment “simply costs more than not having it,” and the

compelling and potentially competing duty to a system of laws that provide for execution. The confluence of these circumstances is especially significant for Judge Calabresi who—as part of the Second Circuit panel—may well serve as a decision maker in the last “of right” appeal that a condemned inmate receives. Wrestling with both conscience and duties, Judge Calabresi finds that, despite his personal opposition to the death penalty, he cannot be “a revolutionary wearing a black robe.”<sup>38</sup> His distaste for the death penalty does not trump his oath. Judge Calabresi emphasizes, however, that he could vote to allow an execution only after great contemplation had convinced him that there was no viable legal justification upon which he could base a vote for reversal. “So what do I do? I wake up in the middle of the night. I use the brains God gave me. I try to think of a way that is correct in the law and which brings about the result that I think is right.”<sup>39</sup>

Should Judge Calabresi be unable to reach such a legal conclusion allowing him to follow his conscience and vote for life, he believes he must follow the law. “I would follow my oath and I would ask my God for forgiveness.”<sup>40</sup> He bases the primacy of the law over his own personal view upon a belief in the American system of justice as a whole. While he identifies the death penalty as morally untenable, Judge Calabresi does not reject the American system. In fact, he “love[s] it, with all its faults.”<sup>41</sup> Supremacy of conscience over law, resulting in nullification of a “legal” death sentence, is a form of judicial “pick and choose” scenario that Judge Calabresi cannot accept. “If I [love the American system of justice], I do not think I can pick and choose, and I do not trust others to pick and choose, without the much more severe punishment, restraint, of rejecting the whole system. So I will not do that.”<sup>42</sup> Still, as Judge Calabresi points out, such an approach—while noble in its dedication to the American

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fact that some undeserving persons are executed is “devastating” to the retributive argument “because in terms of justice you cannot do injustice in the name of justice”).

<sup>38</sup> *Id.* at 8 (citing Nazi Germany and fascist Italy as examples where it may indeed be honorable to nullify and thus be “a revolutionary wearing a black robe”).

<sup>39</sup> *Id.* at 9.

<sup>40</sup> *Id.* at 10.

<sup>41</sup> *Id.* at 8.

<sup>42</sup> *Id.*

justice system—brings about little sense of moral satisfaction in individual cases.<sup>43</sup>

### CONCLUSION

The dialogue among the Catholic practitioners and scholars discussed above manifests both the common ground and diversity of opinion held by Catholics regarding the death penalty. While most Catholics are able to at least accept—if perhaps not embrace—that Church hierarchy has called for abolition, there is substantial disagreement as to what now is required of them. All can agree that one must at least “consider” the Pope’s views. The level of adherence beyond that has not reached consensus, which is even more apparent when asking how a Catholic—whose views do adhere to those of the Church—should act within the decision-making roles of attorney, juror, and judge in the American capital punishment system. Here the advocated or suggested options range from avoidance of any potential conflict by resigning or recusing oneself, to diligently seeking a justifiable legal foundation to support a moral result dictated—at least in part—by one’s faith.

It is unlikely that the controversy within the Church regarding the death penalty will dissipate in the near future. In fact, with the majority of the Supreme Court now Catholic the importance of Catholic death penalty doctrine and the responsibilities of individual Catholics to adhere to that doctrine will likely become an object of still greater focus, both internal and external to the Church.<sup>44</sup> This fundamental question of response to Papal and USCC directives is, of course, not limited to the death penalty. The death penalty—like abortion and birth control—is a lightning rod for conflicting views within a laity

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Lou Pollock, my teacher, a great judge and a great human being, tells the story on himself that when he first became a judge, he had to sentence somebody to a sentence which was much too high, but he was required to do it. So Lou got off the bench, having done it, and he put his arms around this guy whom he had sentenced to life imprisonment, or thirty-five years, or something of that sort, and said to him, “Young man, I cannot tell you how sorry I am.” The man said, “[Blank] you.”

*Id.* at 10.

<sup>44</sup> Christina Cappechi, *Alito Confirmed Gives Court Catholic Majority, Impact Remains Yet Unclear*, CATH. ONLINE, Jan. 31, 2006, [http://www.catholic.org/national/national\\_story.php?id=18523](http://www.catholic.org/national/national_story.php?id=18523).

and clergy encompassing a broad spectrum of political thought. Programs such as *Catholics and the Death Penalty*—deliberately conducted outside the debate format—provide an opportunity for exploration into the differing perspectives that exist within the Church. Concomitant with the importance of such issues, the need for continued dialog will only increase.