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ARTICLES

CAN A CATHOLIC LAWYER REPRESENT A MINOR SEEKING A JUDICIAL BYPASS FOR AN ABORTION? A MORAL AND CANON LAW ANALYSIS

LARRY CUNNINGHAM[†]

INTRODUCTION

Catholic lawyers are uniquely positioned to appreciate the existence of conflicts between religion, morality, and professional obligation. Catholic teaching holds that it is not possible to separate one's existence into different identities—Catholic and lawyer, for example—allotting different moral rules and standards to each role.¹ One's conscience is inseparable and

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¹ See CONGREGATION FOR THE DOCTRINE OF THE FAITH, DOCTRINAL NOTE ON SOME QUESTIONS REGARDING THE PARTICIPATION OF CATHOLICS IN POLITICAL LIFE ¶ 6 (2003) [hereinafter CDF].

It is a question of the lay Catholic's duty to be morally coherent, found within one's conscience, which is one and indivisible. "There cannot be two parallel lives in their existence: on the one hand, the so-called 'spiritual life', with its values and demands; and on the other, the so-called 'secular' life, that is, life in a family, at work, in social responsibilities, in the responsibilities of public life and in culture. . . ."

Id. (quoting John Paul II, Apostolic Exhortation *Christifideles Laici* ¶ 59 (Dec. 30, 1988)).

guides all aspects of one's life.² There are certain fundamental beliefs that are central to Catholicism and that impact all daily decisions; one of them, for example, is the belief that life, at all stages, is to be respected and protected.³ Flowing from this respect for human life, in turn, is the unequivocal, Catholic opposition to abortion.⁴

In certain states, a minor who wishes to obtain an abortion must first get the consent of her parents or at least notify them of her intentions.⁵ The Supreme Court has held that the abortion decision cannot be subject to the veto of a third party, such as a parent.⁶ Accordingly, states with parental notification or consent statutes must afford minors a "judicial bypass"—a confidential, ex parte proceeding in which the minor is afforded an opportunity to convince a judge that she is either mature enough to make the decision to get an abortion or that an abortion is in her best interests.⁷ In some states that have judicial bypass procedures, minors are afforded the right to court-appointed counsel.⁸

² See *id.* § 2, ¶¶ 2, 3 ("If Christians must 'recognize the legitimacy of differing points of view about the organization of worldly affairs', they are also called to reject, as injurious to democratic life, a conception of pluralism that reflects moral relativism.") (citation omitted).

³ See CATECHISM OF THE CATHOLIC CHURCH ¶ 2270, at 547 (2d ed. 1997) ("Human life must be respected and protected absolutely from the moment of conception.").

⁴ See JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶ 58 (1995) [hereinafter *EVANGELIUM VITAE*] ("Among all the crimes which can be committed against life, procured abortion has characteristics making it particularly serious and deplorable. The Second Vatican Council defines abortion . . . as an 'unspeakable crime.'").

⁵ See generally William H. Danne, Jr., Annotation, *Validity, Construction, and Application of Statutes Requiring Parental Notification of or Consent to Minor's Abortion*, 77 A.L.R.5TH 1 (2000) (discussing parental notification and parental consent statutes).

⁶ See *id.* at 33 ("[T]he state does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of a physician and his or her patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."); see also *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976).

⁷ See Danne, Jr., *supra* note 5, at 21–27 (discussing the constitutional requirements of judicial bypass provisions).

⁸ See *id.* at 146 ("[Several courts have] held that it is a prerequisite to the validity of the judicial bypass procedure of a state statute requiring parental consent to or notification of a minor's abortion that it provide for the appointment of counsel for the minor.").

Enter now the Catholic lawyer. Can he or she assist a minor in obtaining a judicial bypass? There are two ways in which the lawyer's actions can be analyzed. Under the Code of Canon Law, does the lawyer incur a canonical penalty, such as excommunication, by providing this professional assistance to the minor? Second, even if the lawyer is not subject to a delict, is the lawyer's assistance nevertheless so at odds with Catholic theology such that he should, as a matter of conscience, decline the case?

I will begin this article in Part I with an analysis of the context of the dilemma: the law of access to abortions by minors and the judicial bypass procedures that are in place in many states. In Part II, I will examine the canonical implications of a lawyer's representation of a minor in a judicial bypass case. In Part III, I will attempt to resolve the moral conflict between, on the one hand, helping those in need, and, on the other hand, the strict Catholic teaching against abortion.

I. JUDICIAL BYPASSES

The landmark U.S. Supreme Court decision in *Roe v. Wade*⁹ recognized a woman's constitutional right to have an abortion.¹⁰ The Court derived its holding from a finding that the Constitution implicitly recognizes a right to personal privacy.¹¹ The *Roe* Court, however, declined to find that the right to privacy affords a woman an absolute right to terminate her pregnancy.¹² A state may regulate the abortion decision where there is a "compelling state interest" and the regulation is "narrowly drawn to express only the legitimate state interests at stake."¹³

After *Roe*, some states enacted laws regulating the ability of minors to obtain abortions.¹⁴ These laws fell into two general categories. Some states prohibited a physician from performing an abortion on a minor unless the minor's parents first gave their

⁹ 410 U.S. 113 (1973).

¹⁰ *See id.* at 154.

¹¹ *See id.* at 152.

¹² *See id.* at 153.

¹³ *See id.* at 155.

¹⁴ *See generally* Danne, Jr., *supra* note 5; Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589 (2002).

consent.¹⁵ A second group of states required physicians to inform or notify parents of their child's desire to have an abortion.¹⁶

These laws were challenged in two principal, post-*Roe* Supreme Court decisions. The first, *Planned Parenthood of Central Missouri v. Danforth*,¹⁷ involved a challenge to a Missouri law that required "the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother."¹⁸ The Supreme Court found that this statute was unconstitutional because it gave third-parties—namely, the juvenile's parents—a veto power over the abortion decision.¹⁹ The Court's rationale for this rule of law flowed directly from its pronouncements in *Roe* that the abortion decision is a fundamental right.²⁰

The Supreme Court provided some measure of guidance to states in the area of regulation of minors' access to abortion-on-demand in *Bellotti v. Baird*.²¹ In *Bellotti*, the Court heard a challenge to a Massachusetts statute that provided that a child under the age of eighteen could only obtain an abortion if she obtained the consent of both parents.²² If one or both parents refused to give consent, a minor could seek consent from a judge.²³ The Court reaffirmed its holding in *Danforth* that a state cannot give an absolute veto power over the abortion decision to a third-party and, on this basis, found the Massachusetts statute unconstitutional.²⁴

¹⁵ See Danne, Jr., *supra* note 5, § 5[a], at 47–51 (discussing state statutes requiring parental consent before a minor can obtain an abortion).

¹⁶ See *id.* at 53 (discussing state statutes requiring parental notification before a minor can obtain an abortion).

¹⁷ 428 U.S. 52 (1976).

¹⁸ See *id.* app. at 85 (appending H. B. 1211, 77th Gen. Assem., 2d Reg. Sess. (Mo. 1974)).

¹⁹ See *id.* at 74 ("[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.").

²⁰ See Danne, Jr., *supra* note 5, § 6[a], at 56.

²¹ 443 U.S. 622 (1979) (4-4 decision).

²² See *id.* at 625.

²³ See *id.*

²⁴ See *id.* at 643, 651 (confirming that "the unique nature and consequences of the abortion decision" make giving absolute discretion over the abortion decision to a third-party improper).

The *Bellotti* Court split 4-4, however, on whether a properly drawn judicial bypass statute would be constitutional.²⁵ Justice Powell and three other members of the Court declared that a statute requiring the consent of one or more parents would be constitutional if it provided a bypass mechanism that enabled the minor to seek a neutral determination of whether she could have the abortion.²⁶ Justice Stevens, writing for himself and three other members of the Court, stated that giving a judge the power to overrule a minor's abortion decision was just as problematic as giving that power to a parent because it would be just as burdensome to the minor and just as arbitrary a decision for a judge.²⁷

Justice Powell's plurality decision is widely considered the law on the subject of parental consent and notification statutes.²⁸ The Powell plurality stated that a consent statute would be constitutional if it provided a bypass mechanism²⁹ that enabled a minor "to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests."³⁰ The bypass

²⁵ A plurality of the Court found that Massachusetts' judicial bypass provision was not sufficient because "it require[d] parental consultation or notification in every instance." *See id.* at 651 (Powell, J.).

²⁶ *See id.* at 643 (concluding that a statute must afford an "alternative procedure" by which the minor could obtain authorization).

²⁷ *See id.* at 655-56 (Stevens, J., concurring) (noting the burden placed on the minor to commence judicial proceedings and the difficulty judges will have in discerning the best interests of the minor).

²⁸ *See Danne, Jr., supra* note 5, § 3, at 34 (describing a case which held that parental consent statutes must include an "adequate procedure for judicially bypassing the parental consent requirement"). Courts have consistently upheld the principle that a state cannot make parental consent "so inflexible a prerequisite to a minor's right to obtain an abortion that the minor's parent or parents have an absolute veto power over her decision." *Id.* at 31. Both federal and state courts have recognized that state legislation requiring parental consent for a minor's abortion can meet federal constitutional standards only if it provides an alternative procedure, generally termed a "bypass option," whereby a qualified minor can show that she should be granted authorization for the abortion even absent parental consent. *See id.* at 31-35 (listing cases where courts have required an alternative judicial bypass procedure).

²⁹ Justice Powell opined that the bypass mechanism need not be judicial. *See Bellotti*, 443 U.S. at 643 n.22 (describing forums other than a court of general jurisdiction that could provide the alternative procedure).

³⁰ *See id.* at 643-44 (footnote omitted); *see also Danne, Jr., supra* note 5, §§ 14-15 (discussing and citing decisions that have considered a minor's maturity and

procedure must be quick, anonymous, and not require pre-notification or consent of one's parents.³¹ Some courts have held that a minor is entitled to appointed counsel in judicial bypass proceedings.³² In some jurisdictions, there is a list of attorneys willing to be appointed to such cases.³³

II. ANALYSIS UNDER CANON LAW

The *Code of Canon Law* contains the internal operating procedures of the Catholic Church,³⁴ regulating the "order and discipline" of its members.³⁵ Canon 1398 imposes an automatic excommunication upon any Catholic who procures a completed abortion.³⁶ In this section, I will address whether a Catholic lawyer who represents a minor in a judicial bypass proceeding incurs this penalty.

A preliminary word on penalties in canon law is in order. "While the Church is a graced community empowered by the Spirit, its members are sinners reflecting the limitations of the

decisions that have evaluated a minor's best interests). It is unclear whether mere parental *notification* statutes must also provide a bypass mechanism. The Supreme Court "has repeatedly emphasized that it has not decided whether such a bypass option is constitutionally required in a parental notification measure." *See id.* § 11[a], at 93; *see also id.* § 12, at 100 (suggesting "there can be no constitutional objection to a parental notification statute having a bypass option that would meet constitutional standards if included in a parental consent statute"). A plurality of the *Bellotti* Court found Massachusetts' parental consent statute to be unconstitutional, notwithstanding its judicial bypass provision, because the statute required parental notification in all instances. *See id.* § 11[a], at 93. In some cases, courts have required a judicial bypass mechanism even with notification. *See id.* § 11[b], at 94. Other cases have held the opposite. *See id.* § 11[c], at 97–98.

³¹ *See Bellotti*, 443 U.S. at 644; *see also* Danne, Jr., *supra* note 5, § 17, at 131–145 (citing and discussing cases relevant to preserving a minor's anonymity).

³² *See* Danne, Jr., *supra* note 5, § 19[a], at 146–47 (detailing cases that required the appointment of counsel). *But see id.* § 19[b], at 147–49 (describing cases that did not require the appointment of counsel).

³³ *See, e.g.*, Jane's Due Process, <http://www.janesdueprocess.org> (last visited Oct. 21, 2005) (maintaining a network of attorneys in Texas willing to accept referrals for judicial bypass cases).

³⁴ The Code only applies to the Latin Church. *See* NEW COMMENTARY ON THE CODE OF CANON LAW c.1 (John P. Beal, James A. Coriden, & Thomas J. Green eds., 2000) [hereinafter NEW COMMENTARY]. Note that text of canons reprinted in NEW COMMENTARY is taken from CODE OF CANON LAW, LATIN-ENGLISH EDITION (1998).

³⁵ *See* JAMES A. CORIDEN, AN INTRODUCTION TO CANON LAW 4 (rev. ed. 2004).

³⁶ *See* NEW COMMENTARY, *supra* note 34, c.1398, at 1602 ("A person who procures a completed abortion incurs a *latae sententiae* excommunication.").

human condition.”³⁷ Punishment serves two principal purposes: to reform the individual and to repair the serious harm done to the community by the ecclesiastical offense.³⁸ Punishment is a last resort—an unfortunate consequence of the failure of informal and rehabilitative kinds of intervention.³⁹ Discussion, counseling, and informal reprimand are all preferred means to deal with a Catholic who has violated a norm or canon.⁴⁰ This is provided for in Canon 1341: “An ordinary is to take care to initiate a judicial or administrative process to impose or declare penalties only after he has ascertained that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, reform the offender.”⁴¹

Every penal offense has three elements.⁴² First, there must be an external violation—that is, matters of internal conscience are not proper subjects of penal sanctions.⁴³ Second, the conduct

³⁷ Thomas J. Green, *Introduction* to NEW COMMENTARY, *supra* note 34, at 1529. Father Coriden expressed the view that “the church is also a human community made up of ornery, erring, and sinful people.” CORIDEN, *supra* note 35, at 5.

³⁸ See CORIDEN, *supra* note 35, at 183 (listing the two purposes of punishment); Green, *supra* note 37, at 1529. The Code itself provides: “The Church has the innate and proper right to coerce offending members of the Christian faithful with penal sanctions.” NEW COMMENTARY, *supra* note 34, c.1311, at 1533. This principle exists to protect the community of the faithful, who joined the Church with certain expectations as to common beliefs and practices. See Green, *supra* note 37, at 1530 (“While some types of diversity (e.g., theological, canonical, ascetical, liturgical) clearly enrich the Church, it cannot tolerate divergent patterns of thought and activity if it is to be faithful to its teaching, sanctifying, and serving mission.”).

³⁹ See CORIDEN, *supra* note 35, at 183 (listing methods to be used prior to punishment); Green, *supra* note 37, at 1532 (“A renewed recognition of human dignity and freedom and of the salvific character of church law underlies the code’s forceful emphasis on penalties only as a last resort when all other legal-pastoral measures have failed to deal with problematic behavior.”).

⁴⁰ See James A. Coriden, *Church Law and Abortion*, 33 JURIST 184, 195–97 (1973) (arguing that *ipso facto* excommunication is often too harsh of a penalty for the crime of abortion). For an example of a bishop’s attempts at reform prior to the imposition of a canonical penalty, see Rene Henry Gracida, *Denying Holy Communion: A Case History*, CATHOLIC EXCHANGE, Dec. 20, 2004, http://www.catholicexchange.com/vm/index.asp?vm_id=2&art_id=26216.

⁴¹ NEW COMMENTARY, *supra* note 34, c.1341, at 1558.

⁴² See CORIDEN, *supra* note 35, at 183.

⁴³ See NEW COMMENTARY, *supra* note 34, c.1321 § 1, at 1540 (“No one is punished unless [there is an] external violation of a law or a precept”); see also CORIDEN, *supra* note 35, at 183–84 (explaining that an external violation must be “not something that is solely in the world of intentions or in the forum of conscience”). Thus, a person cannot be punished for a mere intention or belief. See *id.*

must be “gravely imputable” because of intent or “culpable negligence.”⁴⁴ In contrast to American criminal law,⁴⁵ ignorance of the law is a defense to a canonical penalty.⁴⁶ In the case of automatic censure, the delinquent must know about the censure—not just the crime.⁴⁷ Third, the violation must be of a law to which a penalty has been attached.⁴⁸

There are essentially two types of punishments that can be imposed under canon law: censure/medicinal or expiatory.⁴⁹ A censure can be analogized to an injunction under civil law. The purpose is to gain the offender’s compliance with the law in the future.⁵⁰ A censure or medicinal penalty prohibits the offender from exercising privileges or rights in the religious community.⁵¹ The penalty ends when the offender reconciles himself with the relevant law.⁵² In contrast, an expiatory penalty is intended “to repair the harm done to the community and to deter others from similar offenses”;⁵³ therefore, the penalty does not necessarily end when the offender has been reformed.⁵⁴ Expiatory penalties

⁴⁴ See NEW COMMENTARY, *supra* note 34, c.1321 § 1, at 1540 (stating that, to be punishable, a violation committed by a person must be “gravely imputable [to that person] by reason of malice or negligence”); see also CORIDEN, *supra* note 35, at 183.

⁴⁵ See, e.g., *People v. O’Brien*, 31 P. 45, 47 (Cal. 1892) (explaining why ignorance of the law is no defense).

⁴⁶ See NEW COMMENTARY, *supra* note 34, c.1323 2°, at 1542 (“[A] person who without negligence was ignorant that he or she violated a law or precept” is not subject to penalties.). However, ignorance is not presumed. See *id.* c.15 § 2, at 69; see also *id.* c.1321 § 3, at 1540 (“When an external violation has occurred, imputability is presumed unless it is otherwise apparent.”).

⁴⁷ See *id.* c.1324, at 1543–44 (exempting an “accused” from an automatic penalty if that person did know that there was a penalty associated with the law).

⁴⁸ See *id.* c.1321, at 1540; see also CORIDEN, *supra* note 35, at 183. Not every violation of canon law or Church doctrine is an offense under the Code. See CORIDEN, *supra* note 35, at 183 (“Not every mistake, sinful action, or violation of a canon can be punished by church authority. Only canonical offenses can be punished.”); Green, *supra* note 37, at 1529 (“Not every sin is an ecclesiastical delict warranting a penalty, yet every delict is a seriously sinful act or omission reflecting significant, if not full, freedom and knowledge. . . . Furthermore, not every canonical violation is a delict warranting a penalty.”).

⁴⁹ See NEW COMMENTARY, *supra* note 34, c.1312, at 1534.

⁵⁰ See CORIDEN, *supra* note 35, at 187–88.

⁵¹ See *id.* at 187.

⁵² See *id.* at 187–88. “Since the purpose of medicinal penalties is conversion, a censure must be lifted when the offender repents and is willing to repair the harm done or the scandal caused.” *Id.* at 187.

⁵³ *Id.*

⁵⁴ See *id.* at 187 (explaining that an expiatory penalty may be imposed temporarily or permanently, definitely or indefinitely); see also NEW COMMENTARY, *supra* note 34, at 1554.

include deprivation of offices, rights, or privileges; transfer of office; or dismissal from the clerical state.⁵⁵

A. *Canon 1398*

Canon 1398 provides: “*Qui abortum procurat, effectu secuto, in excommunicationem latae sententiae incurrit.*”⁵⁶

The English translation is: “A person who procures a completed abortion incurs a *latae sententiae* excommunication.”⁵⁷

The canon is a reflection of the Church’s teaching on abortion.⁵⁸ “The Catholic Church has long considered abortion to be not only a grave moral evil but also a crime punishable by canonical sanctions.”⁵⁹

⁵⁵ See CORIDEN, *supra* note 35, at 187.

⁵⁶ EXEGETICAL COMMENTARY ON THE CODE OF CANON LAW c.1398, at 553 (Jorge Miras Ángel Marzoa & Rafael Rodríguez-Ocaña eds., 2004) [hereinafter EXEGETICAL COMMENTARY]; see also CODEX IURIS CANONICI c.1398, at 502 (Canon Law Society of America trans., 1983) (1983) [hereinafter CIC-1983].

⁵⁷ NEW COMMENTARY, *supra* note 34, c.1398, at 1602.

⁵⁸ See *infra* Part III.A.

⁵⁹ J.P. Beal, *Abortion (Canon Law)*, in 1 NEW CATHOLIC ENCYCLOPEDIA 31, 31 (2d ed. 2003). The earliest legislation penalizing procured abortion appeared in the 4th Century. Coriden, *supra* note 40, at 187. Abortion was punished similarly to murder: exclusion from the Christian community for a specified period of time. See *id.* at 188. This punishment applied to women who had abortions and those who assisted with abortions. See *id.*

A violation of Canon 1398 results in a *latae sententiae*⁶⁰ excommunication.⁶¹ Contrary to popular belief, excommunication does not mean dismissal from the Catholic Church. It is a censure/medicinal penalty that is best analogized to a suspension from the Church.⁶² A person who is excommunicated is prohibited from celebrating the sacraments⁶³ and from carrying out offices or ministries in the Church.⁶⁴ An excommunication is always conditional.⁶⁵ A period of excommunication ends upon performance of an act or a promise to terminate the behavior that resulted in the censure.⁶⁶ Like a civil contempt sanction, the

⁶⁰ Punishments are imposed in two ways. A *ferendae sententiae* penalty takes effect only after it is imposed in a judicial or administrative process. See CORIDEN, *supra* note 35, at 186. A *latae sententiae* penalty takes effect *ipso facto*—by the commission of the very offense itself. See *id.* No judicial or administrative intervention is required for a *latae sententiae* penalty to take effect. See *id.* “[A] penalty is *ferendae sententiae*, so that it does not bind the guilty party until after it has been imposed; if the law or precept expressly establishes it, however, a penalty is *latae sententiae*, so that it is incurred *ipso facto* when the delict is committed.” NEW COMMENTARY, *supra* note 34, c.1314, at 1535. *Latae sententiae* penalties are not to be imposed except for “certain singularly malicious delicts which either can result in graver scandal or cannot be punished effectively by *ferendae sententiae* penalties.” See *id.* c.1318, at 1538. The 1983 revision of the Code made a concerted effort to reduce the number of *latae sententiae* penalties; *ferendae sententiae* penalties were to be the norm. See Green, *supra* note 37, at 1531. There was also an effort made to reduce and consolidate the number of penal offenses. See *id.* Nevertheless, the 1983 Code kept in place a *latae sententiae* penalty of excommunication for violation of this canon. See NEW COMMENTARY, *supra* note 34, c.1398, at 1602.

The *latae sententiae (ipso facto)* penalty attached to procured abortion has been the subject of much debate. Some have argued that the canon is both harsh and ineffective. See, e.g., Coriden, *supra* note 40, at 195–96 (“The *ipso facto* excommunication as a penalty for abortion should be rescinded as a universal law of the Church.”).

⁶¹ See NEW COMMENTARY, *supra* note 34, c.1398, at 1602.

⁶² See CORIDEN, *supra* note 35, at 187.

⁶³ “Those who have been excommunicated or interdicted after the imposition or declaration of the penalty and others obstinately persevering in manifest grave sin are not to be admitted to holy communion.” NEW COMMENTARY, *supra* note 34, c.915, at 1110. However, this consequence is suspended if the guilty party is in danger of death. See *id.* c.1352 § 1, at 1565.

⁶⁴ See *id.* c.1331 § 1, at 1549.

⁶⁵ See CORIDEN, *supra* note 35, at 187 (explaining “a censure must be lifted when the offender repents and is willing to repair the harm done or the scandal caused”).

⁶⁶ See NEW COMMENTARY, *supra* note 34, cc.1347 § 2, at 1562, 1358 § 1, at 1571.

excommunicated person holds the keys to his release from the penalty.⁶⁷

1. Acts Prohibited By Canon 1398

As a preliminary matter, Canon 1398 applies only to completed abortions.⁶⁸ Attempts or other incomplete offenses are not punished by this canon.⁶⁹ A 1988 ruling from the Pontifical Council for the Interpretation of Legislative Texts made clear that the term “abortion” applies to all procedures—whether surgical or chemical—that result in the death of a fetus.⁷⁰ Early theologians and philosophers drew a distinction between fetuses that were inanimate (possessing no soul) and animate (ensouled).⁷¹ It was not until the 1917 Code that this distinction was permanently eliminated.⁷² The 1917 Code provided a penalty of *latae sententiae* excommunication for the offense of procuring an abortion.⁷³ The 1983 revision of the Code left the substance of this canon in place.⁷⁴

⁶⁷ See *Mahady v. Mahady*, 448 N.W.2d 888, 890 (Minn. Ct. App. 1989) (“[C]ivil contempt is said to give the contemnor the keys to the jail cell, because compliance with the order allows him to purge himself and end the sanction.”).

⁶⁸ See NEW COMMENTARY, *supra* note 34, c.1398, at 1602.

⁶⁹ See *id.* c.1328 § 1, at 1546 (attempts not punished unless expressly stated in the relevant canon); see also EXEGETICAL COMMENTARY, *supra* note 56, at 554; NEW COMMENTARY, *supra* note 34, at 1603 & n.307.

⁷⁰ See John L. Allen, Jr., *Under Vatican Ruling, Abortion Triggers Automatic Excommunication*, NAT’L CATH. REP., Jan. 17, 2003, at 3. Prior to the 1988 interpretation, there was some debate amongst scholars about whether RU486, intrauterine devices, and other procedures were covered by the term “abortion.” Robert Owen Morrissey, *Abortion and the Excommunication of Canon 1398 in the 1983 Code of Canon Law* (1992) (unpublished Ph.D. dissertation, Catholic University of America) (on file with author). The drafters of the 1983 Code elected not to define “abortion”—it was widely assumed that Church teaching on abortion was well known. See *id.* at 8; see also NEW COMMENTARY, *supra* note 34, at 1603.

⁷¹ See Coriden, *supra* note 40, at 190. “The commonly accepted time of animation was forty days after conception for males and eighty days for females!” *Id.* at 192 n.33. This distinction was later removed by Pope Sixtus V but quickly restored by his successor, Pope Gregory XIV. See *id.* at 192.

⁷² See *id.* at 193.

⁷³ See *id.*

⁷⁴ See NEW COMMENTARY, *supra* note 34, at 1603; see also Morrissey, *supra* note 70, at 46–49. A proposal was made to make the penalty *ferendae sententiae*. This proposal was rejected out of fear that the canon’s effectiveness would be weakened due to the fact that abortion is usually a very private act. See NEW COMMENTARY, *supra* note 34, at 1603.

2. Principles of Interpretation

A starting point for an analysis of Canon 1398 is Canon 18, which provides in relevant part: "Laws which establish a penalty . . . are subject to strict interpretation."⁷⁵ This canon derives from the principle that sanctions are not intended to be imposed any more than absolutely necessary to achieve the desired rehabilitative and deterrent effects.⁷⁶

Canon 17 gives guidance on the interpretation of ecclesiastical laws.⁷⁷ The starting point for any canonical analysis is the plain text of the relevant canon itself.⁷⁸ If the proper meaning of the law cannot be discerned from its text and context, then one is to look to parallel passages, the purpose and circumstances of the law, and to legislative intent.⁷⁹

3. A Plain Meaning Analysis of Canon 1398

The canon speaks in broad terms—its penal sanction applies to "a person"⁸⁰ who commits the act of procuring ("*procurat*" in Latin) a completed abortion.⁸¹ Although the canon does not define the term *procurat*, it has been interpreted to mean "to cause directly and intentionally, by means of physical or moral action, the expulsion of the fetus from the mother's womb."⁸²

Abortion is an act rarely committed alone.⁸³ Doctors, nurses—and, in the case of minors in some states, lawyers—are

⁷⁵ NEW COMMENTARY, *supra* note 34, c.18, at 75. "Strict interpretation limits the law's application to the minimum stated in the law." *Id.* at 75.

⁷⁶ *See id.* at 75–77. In contrast, favorable laws are subject to broad interpretation. *See id.* at 75. Canon 221 elaborates on the concept of restrained punishment: "The Christian faithful have the right not to be punished with canonical penalties except according to the norm of law." NEW COMMENTARY, *supra* note 34, c.221 § 3, at 279.

⁷⁷ *See* NEW COMMENTARY, *supra* note 34, c.17, at 73.

⁷⁸ *See id.*

⁷⁹ *See id.*

⁸⁰ *Id.* c.1398, at 1602.

⁸¹ *See id.* The 1917 Code eliminated an exception for the pregnant woman herself. *See* Lisa Sowle Cahill, *Catholic Commitment and Public Responsibility*, in *ABORTION AND PUBLIC POLICY: AN INTERDISCIPLINARY INVESTIGATION WITHIN THE CATHOLIC TRADITION* 131, 136 (R. Randall Rainey & Gerald Magill eds., 1996); James A. Coriden, *The Canonical Penalty for Abortion as Applicable to Administrators of Clinics and Hospitals*, 46 *JURIST* 652, 657 (1986).

⁸² *See* Coriden, *supra* note 81, at 652–53 (citation omitted) (describing several of the ways *procurat* has been interpreted).

⁸³ *See* Allen, *supra* note 70, at 4; Morrissey, *supra* note 70, at 14.

all necessary to accomplish the prohibited act.⁸⁴ Pope John Paul II commented on this fact in *Evangelium Vitae*.⁸⁵ He noted that the father of the child may place pressure on the mother-to-be to have an abortion.⁸⁶ He may also place indirect pressure on her by abandoning her and not giving her support.⁸⁷ A wider circle of family and friends may also impose personal or financial pressure on the woman to have an abortion.⁸⁸ Finally, of course, the doctors and nurses who actually perform the procedure are responsible because “they place at the service of death skills which were acquired for promoting life.”⁸⁹

It can therefore be said that many people can “cause” or “procure” an abortion: the woman, her doctors and nurses, the politicians and judges who permit or regulate the practice, the hospital and clinic administrators who provide facilities for the procedure, and, in the case of minors, the lawyers who make the procedure available by litigating a judicial bypass case. Keeping in mind the canon’s requirement of strict interpretation of penal laws,⁹⁰ *procurat* must be given a narrow reading. Father Coriden, in summarizing the existing scholarship on the interpretation of *procurat*, concluded that the term refers only to direct participation in a specific abortion.⁹¹ Generalized support, promotion, or opportunity for abortion are actions that may be against Catholic teaching, but do not incur the delict.⁹² *Procurat*

⁸⁴ See CANON LAW SOC’Y OF GR. BRIT. AND IR., *THE CANON LAW LETTER & SPIRIT: A PRACTICAL GUIDE TO THE CODE OF CANON LAW* ¶ 2827, at 809 (1995).

A number of people are always involved in the carrying out of an abortion: the pregnant mother, sometimes the father of her child, her family, friends and advisors, those who in one way or another make possible access to the abortive service, the surgeon who performs the operation, the attendant nurses and other such supportive staff, politicians and legislators who promote this service, etc. A clear distinction must always be drawn between, on the one hand, those who thereby act sinfully and, on the other, those who incur the canonical penalty.

Id.

⁸⁵ See *EVANGELIUM VITAE*, *supra* note 4, ¶ 59.

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ *Id.*

⁹⁰ See *NEW COMMENTARY*, *supra* note 34, c.18, at 75.

⁹¹ See Coriden, *supra* note 81, at 653.

⁹² See *id.* (“[The penalty] does not apply to those who are removed from . . . direct participation.”).

requires direct and physical participation in the actual act of abortion.⁹³

Therefore, Canon 1398, by its plain text, applies to the pregnant woman⁹⁴ and the doctor who physically performs the successful abortion. In contrast, a politician who votes in favor of abortion rights does not incur the Canon 1398 penalty. Similarly, a lawyer who assists a minor in obtaining access to an abortion does not participate directly and physically in the death of the fetus. The lawyer and politician are involved in the abortion process, but only in an abstract and legal sense. *Procurat*, read in conjunction with Canon 18, requires a more direct, physical action on the part of the delinquent.⁹⁵

B. *Accomplice Liability Under Canon 1329*

Canon 1398 does not end the analysis, however, since the Code of Canon Law provides a form of accomplice liability. Canon 1329 sets forth the general rule for accomplice liability, except if provided elsewhere in a particular penal law.⁹⁶ As Canon 1398 does not provide for accomplices one way or another, Canon 1329 is the appropriate tool for answering the question at hand.

In Latin, Canon 1329 states:

§ 1. *Qui communi delinquendi consilio in delictum concurrunt, neque in lege vel praecepto expresse nominantur, si poenae ferendae sententiae in auctorem principalem constitutae sint, iisdem poenis subiciuntur vel aliis eiusdem vel minoris gravitatis.*

§ 2. *In poenam latae sententiae delicto adnexam incurrunt complices, qui in lege vel praecepto non nominantur, si sine eorum opera delictum patratum non esset, et poena sit talis naturae, ut ipsos afficere possit; secus poenis ferendae sententiae puniri possunt.*⁹⁷

⁹³ See *id.* at 654.

⁹⁴ If an abortion is performed involuntarily upon a woman, she would obviously not incur the delict.

⁹⁵ See Coriden, *supra* note 81, at 654.

⁹⁶ See NEW COMMENTARY, *supra* note 34, c.1329 § 1, at 1547.

⁹⁷ CIC-1983, *supra* note 56, c.1329, at 478. The 1917 version of Canon 1329 recognized several different classes of cooperators, including procurers, co-authors, active accomplices, negative accomplices, and accessories after the fact. For *latae sententiae* penalties, the 1983 Code merged all of the historical categories into the aforementioned but-for test of accomplice liability. See Coriden, *supra* note 81, at 653-54; see also H. A. AYRINHAC, PENAL LEGISLATION IN THE NEW CODE OF CANON

In English:

§ 1. If *ferendae sententiae* penalties are established for the principal perpetrator, those who conspire together to commit a delict and are not expressly named in a law or precept are subject to the same penalties or to others of the same or lesser gravity.

§ 2. Accomplices who are not named in a law or precept incur a *latae sententiae* penalty attached to a delict if without their assistance the delict would not have been committed, and the penalty is of such a nature that it can affect them; otherwise, they can be punished by *ferendae sententiae* penalties.⁹⁸

As Canon 1398 imposes a *latae sententiae* penalty,⁹⁹ section 2 of Canon 1329 applies. Canon 1329 essentially establishes a but-for test for accomplice liability:¹⁰⁰ But-for the accomplice's assistance, would the offense have been committed?¹⁰¹ If not, then it can be said that the accomplice's assistance was necessary and the *latae sententiae* penalty would be incurred. However, if an accomplice's assistance was helpful but not necessary, the accomplice does not incur the *latae sententiae* penalty, but can be punished with a *ferendae sententiae* penalty.¹⁰²

There are certain groups of people that plainly satisfy the but-for test of Canon 1329. Nurses who assist with the procedure are necessary accomplices to the physician who "procures" the

LAW ¶ 53, at 70–71 (1920); EXEGETICAL COMMENTARY, *supra* note 56, at 311; STANISLAUS WOYWOD, A PRACTICAL COMMENTARY ON THE CODE OF CANON LAW ¶ 2040, at 454 (Callistus Smith ed., 1957); Morrissey, *supra* note 70, at 15–17 (discussing accomplice liability in canon law).

⁹⁸ NEW COMMENTARY, *supra* note 34, c.1329, at 1547.

⁹⁹ *See id.* c.1398, at 1602.

¹⁰⁰ *See* Morrissey, *supra* note 70, at 20–22. *But see infra* Part II.C.

¹⁰¹ "Paragraph two on *latae sententiae* penalties somewhat more explicitly differentiates between necessary collaborators (accomplices strictly speaking) and secondary collaborators. Necessary collaborators are liable to the same penalty as the principal offender if it can affect them." NEW COMMENTARY, *supra* note 34, at 1548.

¹⁰² *See* NEW COMMENTARY, *supra* note 34, c.1329 § 2, at 479. This distinction between necessary and helpful-but-not-necessary accomplices was made by the commentators of the Canon Law Society of America in NEW COMMENTARY ON THE CODE OF CANON LAW: "Necessary collaborators are those without whose cooperation the delict could not have been committed The involvement of secondary collaborators, on the other hand, is not essential to the commission of the delict Given their lesser delictual involvement, such secondary collaborators are correspondingly punished less severely than the principal offender." NEW COMMENTARY, *supra* note 34, at 1547.

abortion.¹⁰³ Similarly, a parent who forces a child to have an otherwise unwanted abortion is also a necessary accomplice: without the direct pressure, the child would not have had the abortion.¹⁰⁴

Father Coriden has noted that commentators to both the 1917 and 1983 Codes have drawn a distinction between those who show generalized support for abortion and those persons who are necessary for a particular abortion.¹⁰⁵ Only the latter incur the canonical penalty of Canon 1398 by way of Canon 1329.¹⁰⁶ In other words, general support for abortion rights does not incur the delict of Canon 1398. Legislators who vote in favor of pro-choice legislation, therefore, are not automatically excommunicated, even under a reading of Canon 1329.¹⁰⁷ Arguments have been made, however, that they should be sanctioned under other provisions of the Code,¹⁰⁸ such as the canon prohibiting heresy¹⁰⁹ or the canon forbidding the Eucharist to those who persist in manifest grave sin.¹¹⁰

Utilizing this general-versus-specific distinction, Father Coriden concluded that administrators of hospitals where abortions are performed do not incur the automatic excommunication of Canon 1398.¹¹¹ On the one hand, administrators make specific abortions possible and, thus, but-for their assistance the procedures could not occur. However, they are too far removed from specific abortions. Their support is general, not specific to any one abortion.¹¹² Most hospital administrators do not get to know individual patients. They

¹⁰³ See Morrissey, *supra* note 70, at 22.

¹⁰⁴ See *id.*

¹⁰⁵ See Coriden, *supra* note 81, at 654–57.

¹⁰⁶ See *id.*; Beal, *supra* note 59, at 32 (penalty imposed on “those cooperators in an abortion whose cooperation was necessary for the commission of the offense. In other words, only those without whose efforts a particular abortion would not have occurred incur the ‘automatic’ penalty of excommunication”).

¹⁰⁷ See John P. Beal, *Holy Communion and Unholy Politics*, AMERICA, June 21–28, 2004, at 16, 17.

¹⁰⁸ See *id.* at 17 (discussing other possible canons under which these politicians can be punished).

¹⁰⁹ NEW COMMENTARY, *supra* note 34, cc.751, at 915, 1364, at 1575.

¹¹⁰ *Id.* c.915, at 1110; see also Beal, *supra* note 107, at 17.

¹¹¹ See Coriden, *supra* note 81, at 654–55 (“Since [Catholics who administer hospitals or direct clinics where abortions are performed] do not fall within the scope of those who ‘procure abortions’ in the meaning of the canon, [they] do not incur the *latae sententiae* excommunication provided by canon 1398 of the 1983 code.”).

¹¹² See *id.* at 654–57.

have no vested interest in a *specific* woman getting an abortion. Therefore, he concluded that administrators do not incur a *latae sententiae* excommunication.¹¹³

In comparison, a lawyer who represents a particular minor in a judicial bypass proceeding would be a necessary cooperator to a specific abortion. He is directly involved in the death of a particular fetus. In states with judicial bypass statutes, a minor cannot obtain an abortion without first getting permission of either a parent or the court.¹¹⁴ Without the lawyer's assistance, therefore, the minor would not have been able to obtain the abortion. While the lawyer did not provide the direct, physical cause-and-effect assistance to constitute *procurat* under Canon 1398, he is still delinquent under a theory of accomplice liability through Canon 1329.¹¹⁵

Two points about minors and Canon 1398 warrant discussion. The 1983 Code provides generous exceptions to imputability for persons who are below the age of 16¹¹⁶ or ignorant of the law.¹¹⁷ I suspect that, because of these provisions, the number of minors who are truly imputable is small.¹¹⁸ Does this affect the imputability of their lawyers? No. Every cooperator is an individual and must be treated as such. The fact that one accomplice (the client) is not imputable does not change the facts that the delict (the abortion) happened and the lawyer assisted in its occurrence.¹¹⁹ The need to reform the Catholic

¹¹³ On this basis, the 1986 excommunication of Mary Ann Sorrentino, director of Planned Parenthood of Rhode Island, was improper. See *Excommunicated*, CHRISTIAN CENTURY, Feb. 5–12, 1986, at 112; *A Rare Excommunication*, TIME, Feb. 3, 1986, at 25. Ms. Sorrentino was told that she could not participate in her daughter's confirmation because of her support for abortion. A Church official said that she had "excommunicated herself" based on her pro-choice views and advocacy in helping women obtain abortions. See *Excommunicated*, *supra*, at 113. Ms. Sorrentino's support for abortion was general, not specific to any one client or patient. It is possible she was not truly "excommunicated," but instead denied the ability to participate in a sacrament under another canon.

¹¹⁴ See *supra* text accompanying notes 5 and 7.

¹¹⁵ It is no defense to the canonical penalty that the minor could have gone to another lawyer to get the judicial bypass. If this were a defense, a doctor could argue that he was not a necessary cooperator because the patient could have gone to any one of several abortion providers. The canon would lose all efficacy.

¹¹⁶ See NEW COMMENTARY, *supra* note 34, c.1323 1°, at 1542.

¹¹⁷ See *id.* c.1323 2°, at 1542; James A. Coriden, *Even in Lincoln, Doubtful Laws Don't Apply*, COMMONWEAL, Apr. 19, 1996, at 6, 7.

¹¹⁸ "[*Latae sententiae* penalties are very rarely incurred because of the prevalence of mitigating circumstances." CORIDEN, *supra* note 35, at 186.

¹¹⁹ In Ángel Marzoa's commentary to Canon 1329, he states:

lawyer—which is the ultimate purpose of a medicinal penalty—is not obviated by the client’s personal defense to prosecution under Canon 1323 based on lack of imputability.¹²⁰

C. *A Final Word and Caution on Reasonable Doubt, Assistance, and Imputability*

I end this section where I began, with Canon 18’s requirement of strict interpretation. If my analysis is subject to reasonable doubt or disagreement, then the canonical penalty cannot be imposed. Unlike the rule of lenity in American criminal law,¹²¹ Canon 18 applies to all penal laws—not just those that are ambiguous.¹²²

A lawyer’s assistance does not rise to the physical level of *procurat* so as to incur the penalty of Canon 1398 directly as a principal. If the lawyer is delinquent, it can only be because he has acted as a necessary accomplice under Canon 1329. Canon 1329 applies only if the lawyer’s “assistance” (in Latin, “*opera*”)

Modifying circumstances arising from the subjective element affect only the co-delinquents affected by it. The common will that is the presumption for co-delinquency is the result of the will of each person; but each person must be considered individually in his singular phenomenology: for example, age, possible ignorance, fear, etc., in each of the co-delinquents.

EXEGETICAL COMMENTARY, *supra* note 56, at 314.

This principle is also consistent with American criminal law. If P, a principal to a crime, is assisted in a crime by A, his accomplice, A will be found guilty even if P is acquitted based on an “excuse defense,” such as insanity, involuntary intoxication, or duress. An excuse defense “means that the actions of the primary party were wrongful, but that he was not responsible for them because of the excusing condition.” JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 481 (3d ed. 2001). In contrast, if P is acquitted based on a justification defense—a crime never occurred because he was justified in committing the act, such as when P acts in self-defense—the accomplice is not liable. *See id.* Imputability under canon law is closer to an excuse defense than justification because it does not negate the immorality of the conduct. Canon law, for example, does not permit a 15-year-old to have an abortion; it simply says that she cannot be punished for doing so. *See* NEW COMMENTARY, *supra* note 34, c.1323 1°, at 1542.

¹²⁰ “Actually, *latae sententiae* penalties are very rarely incurred because of the prevalence of mitigating circumstances.” CORIDEN, *supra* note 35, at 186.

¹²¹ *See, e.g., In re Kimberly H.*, 196 A.D.2d 192, 194–95, 609 N.Y.S.2d 990, 991–92 (1st Dep’t 1994). At issue was whether an ATM card is a debit/credit card for purposes of enhanced penal law for criminal possession of stolen property; the court found there was ambiguity in the statute and therefore the construction “more favorable to the defendant should be adopted in accordance with the rule of lenity.” *Id.*

¹²² NEW COMMENTARY, *supra* note 34, c.18, at 75 (“Laws which establish a penalty, restrict the free exercise of rights, or contain an exception from the law are subject to strict interpretation.”).

was “necessary.” What is it that he is “assisting?” It is not the physical act of the death of the fetus, but instead the minor’s decision or ability to have the physical act performed. His assistance is a step or two removed from the act, and is legal, not physical, in nature.

Delinquency for the lawyer therefore turns on one’s reading of the Latin word *opera* in Canon 1329, which has been officially translated into English as “assistance.”¹²³ If *opera* requires physical assistance, then the lawyer would not be delinquent. A nurse, however, who physically assists the doctor with the procedure (but does not perform the procedure herself) would be a necessary accomplice. A lawyer’s assistance is not with the actual, physical procedure; it is with providing the opportunity for the physical act to occur. If, on the other hand, *opera* includes not just physical but also other forms of assistance, such as legal, then the lawyer is delinquent.¹²⁴

In reality, the delict of Canon 1398—by way of Canon 1329—will rarely be incurred by lawyers who provide assistance to minors in judicial bypass proceedings. Imputability under Canons 1321 and 1323 requires knowledge of the delict, the automatic nature of the penalty, and the intent to violate the same.¹²⁵ Catholic lawyers who provide representation in judicial bypass cases but who do so with ignorance of the canonical implications for their actions cannot be punished. Education and counseling of such lawyers would be appropriate. Lawyers’ persistence after such informal interventions would then result in delinquency.

Finally, even if a lawyer does not incur the *latae sententiae* penalty of Canon 1398, he could still be subject to a *ferendae*

¹²³ See *id.* c.1329 § 2, at 1547.

¹²⁴ The *Oxford Latin Dictionary* defines “*opera*” as “[an] activity devoted to a task, effort,” “to devote one’s attention, apply oneself (to an activity or task),” and “[w]ork as occupying a person’s efforts, employment.” Of particular relevance is the definition, “[s]ervices in a particular capacity, professional services, labour, etc.” OXFORD LATIN DICTIONARY 1251 (P.G.W. Glare ed., 1997) (1976). This textual analysis suggests that *opera* is not limited to acts of physical assistance. If this is true, then the lawyer’s actions would be *opera* and result in delinquency.

Here I acknowledge my only shortcomings as a novice in this area. As part of the continuing dialogue of legal scholarship, I invite further debate and response to this article from those more knowledgeable about Latin, Canon Law, and specifically about the type of assistance contemplated by the term *opera*.

¹²⁵ See NEW COMMENTARY, *supra* note 34, cc.1321 § 1, at 1540, 1323 2°, at 1542.

sententiae penalty after a judicial/administrative process.¹²⁶ Here, too, the concept of imputability will greatly restrict the number of lawyers who could be punished.

III. THE MORAL IDENTITY OF A CATHOLIC LAWYER

Even if the lawyer does not incur a *latae sententiae* or *ferendae sententiae* penalty for his professional assistance, there remains another question: Whether, as a matter of morality, the Catholic lawyer should take the case in the first place. The Code of Canon Law does not define the boundaries of morality. It is, instead, a set of rules that facilitates the spiritual and worldly business of the Church.

The role of Catholics in public life is not a new subject for theologians or Catholic laypeople. Abortion, in particular, has caused much public discussion regarding the role of religion in public life. Catholic lawyers face this tension in judicial bypass petitions, the prosecution of capital cases, and advocacy for active euthanasia.¹²⁷ Catholic politicians, likewise, can face a conflict between religious duty and obligation to their constituents.¹²⁸ Catholic doctors must decide whether to perform abortions as part of their practices.¹²⁹

A. Catholic Teaching on Abortion

The Catholic Church's teachings on the immorality of abortion could not be more clear: "The Catholic Church has always regarded abortion as an abominable crime because unqualified respect for even the very beginnings of life is a logical consequence of the mysteries of creation and redemption."¹³⁰

¹²⁶ See *id.* c.1329 § 2, at 1547.

¹²⁷ See, e.g., Kevin M. Doyle, *A Catholic Lawyer's View of the Death Penalty*, 29 ST. MARY'S L.J. 949, 949 (1998) (containing a lawyer's description of a Catholic district attorney who finds the death penalty morally indefensible, yet seeks death sentences repeatedly).

¹²⁸ See CDF, *supra* note 1, ¶ 2.

¹²⁹ Pope Paul VI addressed a group of Catholic doctors and discussed their obligations to promote understanding of the beginnings of life. See Pope Paul VI, *Respect for Life in the Womb*, Address to the Medical Association of Western Flanders (Apr. 23, 1977), in 22 POPE SPEAKS 281 (1977).

¹³⁰ *Id.* at 281-82.

Respect for life is a core teaching of Christianity.¹³¹ Abortion is considered a crime against life.¹³²

American Catholic authorities responded swiftly after *Roe v. Wade*¹³³ to condemn the decision¹³⁴ and to call for a constitutional amendment prohibiting abortion.¹³⁵ Catholic hospitals were prohibited from performing abortions, even if required to do so by civil law.¹³⁶

B. *Amorality in Public Life?*

One approach to resolving a conflict between an individual's religious beliefs and duties, on the one hand, and professional duties (to clients, patients, or voters), on the other hand, is to allow the Catholic-professional to engage in a sort of "role amorality."¹³⁷ This view of individual identity posits that one

¹³¹ "Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life." CATECHISM OF THE CATHOLIC CHURCH ¶ 2270 (2d ed. 1997). This gospel of life comes in part from the Commandment, "You shall not kill." *EVANGELIUM VITAE*, *supra* note 4, ¶ 52.

¹³² "Among all the crimes which can be committed against life, procured abortion has characteristics making it particularly serious and deplorable. The Second Vatican Council defines abortion, together with infanticide, as an 'unspeakable crime.'" *EVANGELIUM VITAE*, *supra* note 4, ¶ 58; *see also* Cahill, *supra* note 81, at 134.

This is not to say that Church teaching has always been consistent as to what constitutes "abortion." Early Church thinkers, for example, believed that a fetus was not "ensouled" immediately upon conception. The pre-ensoulment termination of pregnancy was not considered procured abortion or a crime. *See* Cahill, *supra* note 81, at 135; Allen, *supra* note 70, at 3. Today, abortion includes the termination of life from conception on, by any means (chemical or surgical). *See id.*

For a history of Catholic teaching on abortion, *see* M.A. Taylor, *Abortion*, in 1 NEW CATHOLIC ENCYCLOPEDIA, *supra* note 59, at 24, 26–29.

¹³³ 410 U.S. 113 (1973).

¹³⁴ After *Roe v. Wade*, bishops from the Committee for Pro-Life Affairs issued a statement, "This [decision] is bad morality, bad medicine and bad public policy, and it cannot be harmonized with basic moral principles. . . . We have no choice but to urge that the Court's judgement [sic] be opposed and rejected." Lisa M. Hisel, *Catholicism and Abortion Since Roe v. Wade*, CONSCIENCE, Jan. 31, 1998, at 5 (alteration in original).

¹³⁵ The National Conference on Catholic Bishops issued a statement in 1973 calling for a constitutional amendment to overrule *Roe*. *See id.* at 6.

¹³⁶ *See id.* at 5–6.

¹³⁷ *See* CDF, *supra* note 1, ¶ 2 ("Catholics . . . are asked not to base their contribution to society and political life—through the legitimate means available to everyone in a democracy—on their particular understanding of the human person and the common good.")

can, and should, separate out one's public and private lives.¹³⁸ In private, a Catholic may detest abortion, consistent with the Church's teachings. When that same Catholic enters the public realm and serves as a politician, for example, he could argue that his support of pro-choice legislation is justified because he is simply voting for what his pro-choice constituents want. In this way, he assumes that his identity can be separated into public and private roles. As a private Catholic, he opposes abortion. As a public actor, he claims the ability and the duty to put aside his personal beliefs and support what his constituents want. Similarly, a Catholic lawyer who represents a minor in a judicial bypass proceeding could argue that he is simply advocating for what his client wants and that it is not his position to judge his client's morality or to impose his religious beliefs on the minor. He, too, claims to wear two "hats"—that of a good Catholic in private and an obedient, amoral lawyer in public.

This kind of amoral professional identity has been rejected by the Church. The Congregation for the Doctrine of the Faith issued a doctrinal note on the subject of pro-choice politicians in 2004.¹³⁹ The Congregation saw a disintegration of the rule of natural law—the concept that there exists fundamental truths of morality and reason.¹⁴⁰ This decline of natural law has led to a growth of moral autonomy, where each citizen believes he is free to decide for himself what is or is not moral.¹⁴¹ Legislators, too, see themselves as amoral beings—not free to impose their personal, moral beliefs on others. They argue that they are guided only by the personal preferences and beliefs of their constituents.¹⁴²

¹³⁸ See *id.*

¹³⁹ See generally CDF, *supra* note 1. The note was approved by Pope John Paul II on November 21, 2002.

¹⁴⁰ See *id.* ¶ 2.

¹⁴¹ See *id.* ("A kind of cultural relativism exists today, evident in the conceptualization and defence of an ethical pluralism, which sanctions the decadence and disintegration of reason and the principles of the natural moral law.").

¹⁴² See *id.*

As a result, citizens claim complete autonomy with regard to their moral choices, and lawmakers maintain that they are respecting this freedom of choice by enacting laws which ignore the principles of natural ethics and yield to ephemeral cultural and moral trends, as if every possible outlook on life were of equal value.

Id.

The Congregation rejected this line of thinking. It confirmed a bedrock principle of Judeo-Christian theology: there are indeed fundamental, moral truths. The Congregation did not say, however, that being Catholic means giving up one's autonomy to make decisions. There are many political decisions over which reasonable minds can differ.¹⁴³ The Congregation stated, however, that there are certain basic, moral beliefs for which there is universal truth and over which there cannot be reasonable disagreement.¹⁴⁴ These basic, foundational beliefs include the sanctity of life and the prohibitions against abortion and euthanasia.¹⁴⁵ Within the boundaries of basic morality, there are a great number of subjects over which Catholics and all people can have reasonable disagreements.¹⁴⁶ Outside of these boundaries, however, respect for individual autonomy cannot be a justification for violation of a basic principle of morality, such as the sanctity of life.¹⁴⁷

"The church's magisterium has emphasized that politicians are not free to leave their moral principles in the cloakroom when they go to the floor of the legislature, or on the bus when they espouse public policy positions on the campaign trail."¹⁴⁸ This

¹⁴³ See *id.* ¶ 3.

¹⁴⁴ These basic, moral beliefs include defending the right to life from conception to death, opposing divorce, defending the freedom to educate one's children, protecting children, protecting religious freedom, fighting for an economy that serves the common good, pursuing peace, and rejecting violence. See Robert K. Vischer, *Faith, Pluralism, and the Practice of Law*, 43 CATH. LAW. 17, 19–20 (2004).

¹⁴⁵ See CDF, *supra* note 1, ¶ 4.

¹⁴⁶ See *id.* ¶¶ 3, 6.

¹⁴⁷ See *id.* ¶ 6.

¹⁴⁸ See Beal, *supra* note 107, at 16.

It is a question of the lay Catholic's duty to be morally coherent, found within one's conscience, which is one and indivisible. "There cannot be two parallel lives in their existence: on the one hand, the so-called 'spiritual life', with its values and demands; and on the other, the so-called 'secular' life, that is, life in a family, at work, in social responsibilities, in the responsibilities of public life and in culture. The branch, engrafted to the vine which is Christ, bears its fruit in every sphere of existence and activity. In fact, every area of the lay faithful's lives, as different as they are, enters into the plan of God, who desires that these very areas be the 'places in time' where the love of Christ is revealed and realized for both the glory of the Father and service of others. Every activity, every situation, every precise responsibility—as, for example, skill and solidarity in work, love and dedication in the family and the education of children, service to society and public life and the promotion of truth in the area of culture—are the occasions ordained by providence for a 'continuous exercise of faith, hope and charity.'"

has not stopped Catholic politicians from trying to claim amoral professional autonomy to justify pro-choice positions. The debate over Catholic professional identity came to a head during the 2004 U.S. presidential election when pro-choice Catholic John F. Kerry won the Democratic Party's nomination.¹⁴⁹ Some bishops declared that they would not give communion to Kerry because of his pro-choice views and public positions.¹⁵⁰ This, incidentally, was not the first time that pro-choice Catholic politicians came into conflict with the Church's teachings.¹⁵¹

CDF, *supra* note 1, ¶ 6 (quoting John Paul II, Apostolic Exhortation *Christifideles Laici* ¶ 59 (Dec. 30, 1988)).

¹⁴⁹ See, e.g., Julia Duin, *Kerry Cited in Catholic Heresy Case; Lawyer Says Senator Unfit for Eucharist*, WASH. TIMES, July 1, 2004, at A4; Michael Paulson & Patrick Healy, *O'Malley Won't Offer Blessing; Paulist Priest to Deliver Invocation*, BOSTON GLOBE, July 26, 2004, at C3; Amy Sullivan, *Kerry & Religion: Can He Reach 'Persuadable' Catholics?*, COMMONWEAL, June 4, 2004, at 13; Tim Townsend, *Burke Clarifies Voting Stance*, ST. LOUIS POST-DISPATCH, Sept. 3, 2004, at A1.

¹⁵⁰ See Sullivan, *supra* note 149, at 13. The Archbishop of Dublin cautioned, "[t]he Eucharist must not become a political battleground." *Id.* A Pew Research Center poll found that 72% of Catholics did not believe that pro-choice politicians should be denied communion. See Chuck Haga, *Church Meets State*, STAR TRIB. (Minneapolis), Oct. 16, 2004, at 1A.

Bishop Rene Henry Gracida of Corpus Christi, Texas, in a 2004 article, described a case history of the process he went through in trying to get a Catholic pro-choice politician to change his public stance on the subject. See generally Gracida, *supra* note 40. Bishop Gracida ultimately imposed an excommunication on the politician. See *id.*

¹⁵¹ In 1983, Cardinal John O'Connor of New York publicly stated that Vice Presidential candidate Geraldine Ferraro could be in trouble with the Church because she supported the right of a woman to get an abortion. See Hisel, *supra* note 134, at 8. Catholic bishops had stated that it was not possible to separate morality from public policy. See *id.* In 1991, eight anti-abortion groups delivered to the Pope the names of Catholic politicians who they thought warranted excommunication because of their public positions in favor of a right to abortion. See *Excommunication Plea*, CHRISTIAN CENTURY, Dec. 11, 1991, at 1160. The politicians included Senator Daniel Patrick Moynihan, Governor Mario Cuomo, and Senator Edward Kennedy. See *id.* There was no papal response to the petition. See *id.*

In 1984, New York Governor Mario Cuomo delivered a speech in which he defended his belief in amoral professional identity:

While we always owe our bishops' words respectful attention and careful consideration, the question whether to engage the political system in a struggle to have it adopt certain articles of our belief as part of public morality is not a matter of doctrine: it is a matter of prudential political judgement [sic]. . . . With regard to abortion, the American bishops have had to weigh Catholic moral teaching against the fact of a pluralistic country where our view is in the minority, acknowledging that what is ideally desirable isn't always feasible, that there can be different political approaches to abortion besides unyielding adherence to an absolute prohibition.

C. *A Conflict with the Duty to Promote Social Justice?*

Can an argument also be made that amorality furthers the goal of social justice? One of the core traditions of Catholicism is the involvement of the faithful in efforts to influence public policy in favor of social justice.¹⁵² Catholics can, and should, help shape society to promote positive social change.¹⁵³ This is reflected, most strikingly, in the efforts by Catholics to aid the poor.¹⁵⁴ Promoting social justice involves not only volunteering at a soup kitchen or donating money to a relief mission. It also embodies the idea of involvement in public life to address the root causes of poverty and other social ills.¹⁵⁵ The concept of social justice is rooted in the dignity of the human person.¹⁵⁶ This duty is so paramount to the beliefs of all Catholics that the legislator included it as an obligation of the faithful in Canon 222.¹⁵⁷

Catholic lawyers have a special duty to aid the poor and others who need access to justice. In a 1965 address to the International Association of Lawyers, Pope Paul VI discussed the role of lawyers in society.¹⁵⁸ He noted that the Church looks upon lawyers with “the greatest esteem and respect”—we are “[m]inister[s] of charity[,]” who seek out truth and make the justice system available to all, including the poor and uneducated.¹⁵⁹ He spoke of the role of lawyers in guiding clients, analogizing them to patients who need medical treatment and students who need education.¹⁶⁰ In carrying out their day-to-day work, “[p]erhaps no one, except the priest, understands human life better in its extremely varied aspects—its most dramatic, its

Hisel, *supra* note 134, at 8.

¹⁵² See R. Randall Rainey, Gerard Magill & Kevin O'Rourke, *Introduction: Abortion, the Catholic Church, and Public Policy*, in *ABORTION AND PUBLIC POLICY: AN INTERDISCIPLINARY INVESTIGATION WITHIN THE CATHOLIC TRADITION*, *supra* note 81, at 1, 2.

¹⁵³ *See id.*

¹⁵⁴ “[The Christian faithful] are also obliged to promote social justice and, mindful of the precept of the Lord, to assist the poor from their own resources.” *NEW COMMENTARY*, *supra* note 34, c.222 § 2, at 283.

¹⁵⁵ *See NEW COMMENTARY*, *supra* note 34, at 283–84.

¹⁵⁶ *See id.*

¹⁵⁷ *See id.* c.222 § 2, at 283.

¹⁵⁸ *See generally* Pope Paul VI, *The Lawyer's Role, Address to Representatives of the International Association of Lawyers* (May 14, 1965), in *10 POPE SPEAKS* 294 (1964).

¹⁵⁹ *See id.* at 294.

¹⁶⁰ *See id.*

most sorrowful, sometimes its most defective, but often its best aspects."¹⁶¹

The duty to help the poor is an ethical obligation of all lawyers. The Ethical Considerations of the ABA Code of Professional Responsibility encouraged lawyers to accept court appointments in indigent cases and to otherwise assist the poor.¹⁶² The current ABA Model Rules of Professional Conduct recognize a professional duty to accept court appointments to represent the indigent, absent good cause.¹⁶³

Although little data exists on the demographics of those who seek judicial bypasses, I suspect that most potential petitioners are economically poor. Minors themselves generally have few assets or income. They are most often dependent on their parents for support. They are expected to devote their time to school, not work. Although teenage pregnancy cuts across all socioeconomic strata, there is some evidence to suggest that the problem disproportionately falls on girls in lower socioeconomic strata¹⁶⁴ and among racial and ethnic minority groups.¹⁶⁵ The teenagers who seek a judicial bypass, however, are more likely to be white and upper-middle class, evincing a disparity along race and class lines in terms of who is actually accessing this legal remedy.¹⁶⁶

¹⁶¹ *Id.* at 294–95.

¹⁶² See MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 (1980); Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 639–40 (1997).

¹⁶³

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: . . . (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

MODEL RULES OF PROF'L CONDUCT, R. 6.2 (2003) [hereinafter MODEL RULES]; see also Collett, *supra* note 162, at 639–40.

¹⁶⁴ See Rebekah Levine Coley & P. Lindsay Chase-Lansdale, *Adolescent Pregnancy and Parenthood: Recent Evidence and Future Directions*, 53 AM. PSYCHOLOGIST 152, 153 (1998) (noting that female adolescents raised in poverty are at higher risk of teenage pregnancy).

¹⁶⁵ See *id.* at 152 (citing adolescent births as being highest among Hispanics and African-Americans, not whites); Stanley K. Henshaw & Dina J. Feivelson, *Teenage Abortion and Pregnancy Statistics by State, 1996*, 32 FAMILY PLANNING PERSPECTIVES 272, 275 (2000) (pregnancy rates highest among black adolescents, intermediate among Hispanics, and lowest among non-Hispanic whites).

¹⁶⁶ See Simone Liebman, *Striking a Parental Notification Statute Under Oregon Constitutional Law*, 70 OR. L. REV. 651, 657 (1991) (discussing results from Minnesota).

In the abstract, a strong argument could be made that the *pro bono* or court appointed representation of minors in judicial bypass cases actually serves the duty to promote social justice. These lawyers make a legal remedy available to those who would, without their assistance, be shut out from the legal system.¹⁶⁷ *Roe* opened up a legal right to all women, including underage girls. States that have attempted to limit this right by requiring notification or consent of a child's parents, also must provide a mechanism—ordinarily, through the courts—to bypass the parents. Every client—rich or poor, male or female, pregnant or not, Catholic or not—deserves the guiding hand of an experienced lawyer-advocate. Can it be that, in the case of abortion, this is one area where a Catholic lawyer should not help to satisfy an unmet legal need?

D. Catholic Lawyers

A Catholic lawyer who helps a minor to obtain a judicial bypass must come to grips with the moral reality that he is

¹⁶⁷ A minor could probably represent herself in a judicial bypass proceeding. Texas law, for example, contains several provisions designed to assist the *pro se* applicant. See, e.g., TEX. FAM. CODE ANN. § 33.003(m) (Vernon 2002) (uniform petition form to be used); *id.* § 33.003(n) (no filing fees for a judicial bypass petition); *id.* § 33.004(d) (uniform notice of appeal form); *id.* § 33.004(e) (no filing fee for appeal); *id.* § 33.011 (requiring the Department of Health to produce and distribute materials, in English and Spanish, that explain the abortion rights of a minor); TEX. PARENTAL NOTIFICATION R. 1.7 (rules to be made available to minors without charge) (LEXIS through 2005 changes); *id.* R. 2.1(b)(2) (petition filed in improper court must be transferred by the clerk, not refused).

The clerk must give prompt assistance—in a manner designed to protect the minor's confidentiality and anonymity—to persons seeking to file an application. If requested, the clerk must administer the oath required for the verification page or provide a person authorized to do so. The clerk should also redact from the cover page any information identifying the minor. The clerk should ensure that both the cover page and the separate verification page are completed in full.

Id. R. 2.2(a).

The court should attempt to rule on the application without regard to technical defects in the application or the evidence. Affidavits of persons other than applicants are admissible. Statements in the application cannot be offered as evidence to support the application. If necessary, the court may assist the minor in remedying technical defects in the application and in presenting relevant and material facts.

Id. R. 2.4(e). Despite these protections for *pro se* litigants, having an attorney improves the minor's chances of success because of the proof that is required, the emotional and stressful nature of the proceeding, and the possible hostility of the trial judge.

assisting a person to commit an act that the Church teaches as unequivocally immoral. He cannot justify this by adherence to amorality or moral relativism—that, as a lawyer, he does not make moral judgments about or for his client, that he is only following the law, providing access to justice, and enabling his young client to have full access to her rights under the law. He also cannot justify his actions by adherence to the pursuit of social justice. To the Catholic Church, abortion is not social justice, but murder.

From the perspective of Catholic teaching, there is no middle ground or debate on the fundamental dignity of the human person and the right to life.¹⁶⁸ A Catholic's morality, as a natural law concept, is not governed by the positive law of a given day or location.¹⁶⁹ Central to Judeo-Christian theology is a belief in objective good and evil.¹⁷⁰ A "properly formed conscience" is a Catholic's "ethical compass" and helps him choose between the two in day-to-day decisions.¹⁷¹ Faith is not an on-off switch that can be disengaged during the nine-to-five workday.¹⁷² A Catholic uses his morality and conscience to guide all aspects of his life.¹⁷³

Perhaps the role of lawyer is different from other professionals. As lawyers, we are ordinarily not allowed to make decisions as to what is best for our clients. The ABA Model Rules of Professional Conduct command us to obey our clients' wishes as to the objectives of the representation.¹⁷⁴ We are forbidden by the rules of our profession from imposing our decisions and beliefs about morality upon our clients. There is something appealing to this client-centered model of lawyering. The model of lawyer-as-agent places the decision-making power in the

¹⁶⁸ See *EVANGELIUM VITAE*, *supra* note 4, ¶¶ 68–74 (discussing the problem of ethical relativism present in society and in the legal system).

¹⁶⁹ See Collett, *supra* note 162, at 653; Robert J. Muise, *Professional Responsibility for Catholic Lawyers: The Judgment of Conscience*, 71 NOTRE DAME L. REV. 771, 773–74 (1996) (explaining that to Catholics, "the Lord as God is the core and heart of the Law").

¹⁷⁰ See Muise, *supra* note 169, at 782–83.

¹⁷¹ See *id.* at 771–72.

¹⁷² See Vischer, *supra* note 144, at 19–20. "[Catholic teaching] precludes the acceptability of the segmented life . . ." *Id.* at 20.

¹⁷³ See *id.* at 19–20.

¹⁷⁴ See MODEL RULES, *supra* note 163, R. 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.").

hands of the party that will have to live with the outcome of the case: the client. Clearly, then, a Catholic lawyer cannot tell his client that he will not seek a judicial bypass, if that is in fact what she wants.¹⁷⁵ But that does not answer the question of whether the Catholic lawyer should accept the case in the first place.

Putting aside the Code of Canon Law for a moment, can a Catholic lawyer morally represent a minor in a judicial bypass proceeding under the rationale that it is the client who ultimately makes the decision whether to have an abortion? No. The lawyer makes the immoral practice available to the minor. But for his assistance, the abortion would not occur.¹⁷⁶ He is not a disinterested, neutral party who is simply performing a rote task, like a court clerk who accepts a petition for filing. A lawyer, as a trained professional, places all of his education, skills, and experience into diligently representing¹⁷⁷ his client's position.¹⁷⁸

Lawyers are frequently called upon to advocate for positions which they do not necessarily personally espouse. To an extent, a certain degree of amoral agency is assumed in the lawyering role under American legal ethics. But that does not mean a Catholic must accept every case that walks in the door or, for that matter, must be a lawyer at all. The decisions to be a

¹⁷⁵ Cf. Vischer, *supra* note 144, at 17.

¹⁷⁶ The argument can again be made that the child-client could simply go to another lawyer. However, there may be only a few lawyers in a given community that will agree to handle these types of cases. There is no guarantee that in a given community the client would be able to find a lawyer to handle the case. The morality—rightness or wrongness—of one's actions should not depend on the attorney population of the community one lives in.

¹⁷⁷ A lawyer has an ethical obligation to zealously represent the stated interests of his client:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

MODEL RULES, *supra* note 163, R. 1.3 cmt. 1.

¹⁷⁸ See Collett, *supra* note 162, at 664–65 (“By accepting [a] court appointment in judicial bypass proceedings, the lawyer would be agreeing to publicly defend the act of abortion and to make that act possible through obtaining a court order authorizing the procedure.”).

lawyer or to accept a client who wants a judicial bypass are both voluntary¹⁷⁹ and, in this case, with moral consequences.

This conclusion does not mean Catholic lawyers must turn in their bar cards and resign from the profession. Just the opposite is true—lawyers, as ministers of justice, have a vital role to play in ensuring access to justice.¹⁸⁰ What is at issue is a narrow range of cases—petitions for a judicial bypass, prosecutions where the death penalty is sought, and the representation of a person seeking active euthanasia—where the lawyer would be called upon to advocate a position that is in direct conflict with a *fundamental* belief of his faith. As stated by Professor Vischer:

[T]he vision illuminated by the [Congregation for the Doctrine of the Faith] allows the Catholic lawyer to function as a lawyer in a liberal democracy by justifying her deference to the rightful preeminence of the client. Where the client's objectives implicate values that diverge from the lawyer's own religion-based values, but do not contradict the fundamental dignity of the human person embodied in the moral law, affording autonomy to the client is appropriate, as is the secular state's autonomy from faith communities' claims of religious truth. Such deference is necessarily limited only where the client proposes a course of conduct that clashes with the moral law's conception of the human person.¹⁸¹

CONCLUSION

Canonically and morally, a Catholic lawyer should not represent a minor who seeks a judicial bypass. The lawyer who undertakes such a representation, with knowledge of the crime and the canonical penalty, incurs the *latae sententiae* (automatic) excommunication of Canon 1398 because he is a necessary accomplice to the abortion act.¹⁸² Morally, he is assisting another person to commit a violation of a fundamental, moral belief of the Catholic faith. Whether for pay or *pro bono*, such cases should be declined by the lawyer.

This is arguably a conclusion that conflicts with the duty of all Catholics to promote social justice. Although lawyers are

¹⁷⁹ In the Conclusion, I will address what should happen if a Catholic lawyer is involuntarily forced to represent a minor in a judicial bypass.

¹⁸⁰ See Pope Paul VI, *supra* note 158, at 294.

¹⁸¹ Vischer, *supra* note 144, at 23–24 (footnote omitted).

¹⁸² See NEW COMMENTARY, *supra* note 34, cc.1329, at 1547, 1398, at 1602. This assumes that “opera” includes acts of non-physical assistance. See *supra* Part II.C.

uniquely positioned to assist the poor to obtain access to justice, this is one type of *pro bono* case that should be left to others to handle. For a Catholic lawyer interested in helping children, there are many other unmet legal needs in the areas of delinquency, abuse, neglect, public benefits, foster care, and adoption for which *pro bono* assistance of skilled lawyers is desperately needed.

What, then, is a lawyer to do if he is appointed by a judge to represent a minor in a judicial bypass proceeding? Although the Supreme Court has not addressed the issue of whether court-appointed counsel is constitutionally required in a bypass case,¹⁸³ many states require or permit trial judges to appoint a lawyer—at the government's expense—to represent the minor. As an initial matter, a Catholic lawyer in such a state should request his local trial court not to appoint him to bypass cases.

In general, a lawyer has an ethical obligation under Model Rule 6.2 to accept court appointments.¹⁸⁴ However, Model Rule 6.2 contains a very important exception. A lawyer is permitted to seek a withdrawal if “the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.”¹⁸⁵ Little doubt exists that a Catholic lawyer would be justified in seeking court permission to withdraw from a judicial bypass case on the grounds espoused in this article.¹⁸⁶

¹⁸³ See Danne, Jr., *supra* note 5, §§ 19(a)–(b), at 146–49 (discussing cases which have held that appointment of counsel was a prerequisite to a valid judicial bypass statute, as well as cases which have held the opposite).

¹⁸⁴ See MODEL RULES, *supra* note 163, R. 6.2 (“A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause[.]”).

¹⁸⁵ *Id.*

¹⁸⁶ See *Ind. Planned Parenthood Affiliates v. Pearson*, 716 F.2d 1127, 1137 (7th Cir. 1983) (stating “we would certainly expect an attorney who held such beliefs [that abortion is immoral] not to accept a court appointment”); Collett, *supra* note 162, at 664–65; Vischer, *supra* note 144, at 24.

In a formal ethics opinion, the Tennessee Board of Professional Responsibility was called upon to answer an inquiry from a “devout Catholic” who routinely practices in juvenile court and had been appointed to represent minors seeking judicial bypasses. See Bd. of Prof'l Responsibility of the Supreme Court of Tenn., Formal Ethics Op. 96-F-140, at 1, 3–4 (1996). This troubling legal ethics opinion has raised concerns about whether a Catholic lawyer could, in fact, refuse an appointment or withdraw from such a case. See *id.* The Board opined that appointed counsel could not withdraw from a case except for “compelling reasons.” *Id.* at 3. “Compelling reasons,” the Board held, do not include “the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, . . . or the belief of the lawyer regarding the merits of the civil case.” *Id.* at 3–4. The

Board stated that the proper course was for the attorney to present a motion to withdraw and present evidence of inability to represent his client before the tribunal. *See id.* at 4–5. Still, the Board expressed pessimism that a court would permit withdrawal, analogizing the representation to that of an unpopular defendant. *Id.* at 4. Ethics Opinion 96-F-140 has been criticized as a “[c]orrupt [v]ision of [l]awyers as [m]outhpieces” that fails to take into account the relevant provisions of Rule 6.2. *See Collett, supra* note 162, at 640, 644–45.