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WHEN CONSCIENCE CLASHES WITH STATE LAW & POLICY: CATHOLIC INSTITUTIONS: *A RESPONSE TO SUSAN STABILE*

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I have been asked to give a practitioner's gloss on Professor Stabile's remarks. The rationale, I suppose, is that law school professors are presumed to reside in philosophers' caves where they contemplate the Forms—or in some cases, the Shadows—whereas lawyers are Aristotelians living in the "real world." In truth, however, there is little I substantively disagree with, with respect to Professor Stabile's presentation, and I think her observations accord with my "real world" experiences.

I can and will speak about the New York Court of Appeals' "Contraceptive Mandate" decision, *Catholic Charities of the Diocese of Albany v. Serio*[1]—as Amy Uelmen mentioned in her introduction, I drafted a brief amicus curiae on behalf of the Catholic League for Religious & Civil Rights and Campus Crusade for Christ arguing that a statute which required ostensibly religious employers, if they provided prescription drug coverage for their employees, to also include contraceptives,

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[1] 7 N.Y.3d 510, 859 N.E.2d 459, 825 N.Y.S.2d 653 (2006), *cert. denied sub nom.* Catholic Charities v. Dinallo, No. 06-1550, 2007 WL 1494780 (U.S. Oct. 1, 2007).

violated the New York State Constitution's free exercise clause.[2] I will also address two other of my representations where conscience rights were assailed.[3]

Taken on its' own terms, *Serio* is a well-crafted—though flawed—decision.

In interpreting the New York State Constitution, *Serio* does put the state free exercise clause on more solid ground than it had been in over a decade and a half since the United States Supreme Court decided *Employment Division v. Smith*[4]—a case involving an American Indian peyote cult, which upheld laws of general application against free exercise challenges under the United States Constitution.

In dicta, *Serio* enacts certain firewalls against legislation that would infringe on free exercise under the New York State Constitution—such as laws that would violate the seal of the confessional, as certain state legislatures, including New Hampshire's, Kentucky's, and Maryland's, not long ago considered enacting in the wake of the priest abuse scandals.[5]

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[2] The state free exercise clause is more expansive than that found in the United States Constitution:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

N.Y. CONST. art. I, § 3.

The extremely parsimonious religious employer exemption in the Contraceptive Mandate legislation excludes from its definition organizations like Catholic Charities of the Diocese of Albany and the Carmelite Sisters for the Aged and Infirm because their charitable efforts are not limited solely to co-religionists—a definition so crimped to exclude any religious charitable organization whose services are offered freely to all. *See* N.Y. INS. LAW § 3221(l)(16)(A)(1) (McKinney 2007) (defining religious employer inter alia as one who "serves primarily persons who share the religious tenets of the entity").

[3] Posillico v. Spitzer, No. 1300-06 (Sup. Ct. Nassau County), *withdrawn* (Mar. 22, 2006); Pregnancy Res. Ctr., Inc. v. Spitzer, No. 103182-02 (Sup. Ct. N.Y. County Mar. 22, 2002).

[4] Employment Div. v. Smith, 494 U.S. 872, 874, 890 (1990).

[5] *See, e.g.*, Jo Becker & Caryle Murphy, *McCarrick Decries Md. Child Abuse Bill: Cardinal Questions Effect on Confessional*, WASH. POST, Feb. 22, 2003, at B1 (quoting the Cardinal Archbishop of Washington as having written in the diocesan newspaper, " 'If this bill were to pass, I shall instruct all priests in the Archdiocese of Washington who serve in Maryland to ignore it. . . . On this issue, I will gladly plead civil disobedience and willingly—if not gladly—go to jail.' "). The dicta in *Serio* is supported by an eloquent, early nineteenth century opinion authored by DeWitt

While I do agree with Professor Stabile that the court did not sufficiently credit the burden placed on free exercise and seriously misconstrues the Church's mission, despite its "hot button" topic, however, it would be wrong to see *Serio* as an example of judicial activism. Rather, it is very deferential to the Legislature.

As such, it serves as a cold reminder to those of us who desire to see *Roe v. Wade*[6] overturned: What overturning *Roe* means is that the United States Supreme Court—and other principled *state* courts like the New York Court of Appeals—would defer to legislation that various state legislatures pass. Such legislation could be what we—as citizens who are faithful Catholics—would consider objectively "good," or it could be objectively "bad."

And here is where legislation—like the Contraceptive Mandate or same sex adoption mandates[7]—is of concern to Catholic Institutions and faithful individuals, especially those in ever increasingly blue-tinged states like New York or Massachusetts: The trend is towards restricting the ability of religious institutions and people of faith to participate in the Public Square.[8]

Clinton—an important figure in the history of New York State and subsequent governor—that held that the New York State Constitution's free exercise guarantee vouchsafed the inviolability of the seal of the confessional:

> To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman [C]atholic religion would be thus annihilated. . . . Although we differ from the witness and his brethren, in our religious creed, yet we have no reason to question the purity of their motives, or to impeach their good conduct as citizens. They are protected by the laws and constitution of this country, in the full and free exercise of their religion, and this court can never countenance or authorize the application of insult to their faith, or of torture to their consciences.

People v. Philips (N.Y.C. Gen. Sess. N.Y. County 1813), *reported in* WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA (photo. reprint 1974) (1813).

[6] 410 U.S. 113 (1973).

[7] For an analysis of the literature on adoption by same sex couples and their methodological shortcomings, see George Reckers & Mark Kilgus, *Studies of Homosexual Parenting: A Critical Review*, 14 REGENT U. L. REV. 343 (2002).

[8] *See* Gerald J. Russello, *New York, Chipping Away at Religious Liberty*, NAT'L CATH. REG., Nov. 5–11, 2006, at 9 (" 'The [Contraceptive Mandate] legislation signals a radical world-view shift from a Judeo-Christian based ethic to an illiberal secular one where conscientious adherence to the old principles of morality cannot even be accommodated.' ").

What we need to be aware of is that there is a "Clash of Orthodoxies," to use Professor Robert George's phrase[9]—or put less polemically, people are recounting very different moral narratives, with very different conceptions of "rights," with one side largely conceiving rights as "negative"[10] and the other as "positive,"[11] as Professor Stabile noted.

On the one hand, there is the Old Orthodoxy, rooted in the natural law tradition and, indeed, the very traditions of this Republic, and on the other, an emerging, liberal secular orthodoxy—a New Orthodoxy that reigns triumphantly in institutions such as the Law Schools (even, I suspect, certain of those "in the Jesuit tradition"), the media, the Democratic Party, and much of the judiciary.

This liberal, secular orthodoxy—and I will get to some practitioners' examples in a moment—this New Orthodoxy, is one that is intolerant of the Old Orthodoxy and very much on the march.

Indeed, the history of the Contraceptive Mandate legislation illustrates this.

New York's statute was modeled on one first passed by California, containing the very narrow religious employer's exemption that Professor Stabile discussed. While the New York legislative history is more plain vanilla, a fair reading of the California legislative history supports, I think, a conclusion that the bill was designed to target the Church.[12] For example:

- The legislative record included a 1999 study by PricewaterhouseCoopers that noted that approximately ninety percent of insured Californians already had contraceptive coverage. To the extent a gap existed—that remaining ten percent—it was a "Catholic gap."

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[9] *See generally* ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION AND MORALITY IN CRISIS (2001).

[10] The First Amendment's restraint upon Congress from passing laws restricting the free exercise of religion is an example of a negative right.

[11] The right to state-funded abortion if the state chooses to fund pre-natal care programs, such as was (unsuccessfully) argued in the New York case *Hope v. Perales*, 83 N.Y.2d 563, 571, 634 N.E.2d 183, 184, 611 N.Y.S.2d 811, 812 (1994), is an example of a positive right.

[12] The recitation that follows is taken primarily from Petitioner's Brief on the Merits submitted to the Supreme Court of the State of California in the case *Catholic Charities of Sacramento Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004).

- Testifying before the California State Senate Insurance Committee in support of the proposed legislation on June 30, 1999, Kathy Kneer (the Chief Executive Officer of Planned Parenthood Federation of California, one of the bill's principal proponents) admitted that the intent of the bill was to "close the gap" in contraceptive coverage, and argued that a broad religious exemption would "defeat" the original purpose of the bill."
- Background information submitted to the State Insurance Committee in support of the bill referenced Catholic employers like the University of San Francisco, specifically, and Catholic hospitals and social service agencies in general.
- State Senator Jackie Speier, the chief Senate sponsor, was challenged by State Senator Byron Sher as to the rationale of such a crimped exemption, and she replied that each of the four prongs[13] was needed "so as *not* to exempt various religious institutions," but instead specifically to capture targeted Catholic religious institutions within the four corners of the mandate.
- As a result, the language—modeled after language drafted by the American Civil Liberties Union[14]—was crafted to exclude as few Catholic institutions as possible.

I could go on, but the point is that the New Orthodoxy is overtly hostile to the right of conscience and seeks to compel all to bow before it. This marks a sea change from the previous

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[13] The four prongs referenced to by Professor Stabile are as follows: (1) primary purpose inculcate religious values, (2) primarily employs people who share religious tenets of entity, (3) serves primarily persons who share the religious tenets of the entity, and (4) is a non-profit organization under certain specific IRS provisions.

[14] Carol Hogan, *Conscience Clauses and the Challenge of Cooperation in a Pluralistic Society*, CAL. CATH. CONF., Feb. 2003, http://www.cacatholic.org/rfconscience.html ("The exact language of the exemption was specifically developed by the ACLU, made available to legislators in the various states considering a contraceptive mandate, and is in fact contained in the recently enacted New York contraceptive mandate, which also fails to exempt most New York Catholic social service, healthcare and educational institutions.").

attitude which, despite rapidly changing mores, deferred to the conscience rights of individuals and institutions.

For example, after the *Roe v. Wade* decision, Congress passed the "Church Amendment"—not referring to ecclesial entities, but to Senator Frank Church, a liberal Idaho Democrat who authored a conscience clause provision that stated that receipt of federal funds would not require hospitals to participate in abortion or sterilization procedures if they objected on moral or religious grounds.[15]

Many states adopted similar provisions. For example, New York has a broad conscience provision concerning abortion, which can be found at section 79-i of the Civil Rights Law. It provides: "When the performing of an abortion on a human being or assisting thereat is contrary to the conscience or religious beliefs of any person, he may refuse to perform or assist in such abortion."[16]

But that was then, and this is now.

And since I am supposed to give a practitioner's gloss, I will share two examples from my practice where conscience rights have been cast aside by an aggressive proponent of the New Orthodoxy—two cases where I sought to quash subpoenas by then New York Attorney General, now Governor, Eliot Spitzer.

The first example did get a fair amount of national attention.[17] The Attorney General sought to subpoena crisis pregnancy centers and force them to enter into consent decrees, which we argued violated their First Amendment rights, seeking inter alia to limit what they could say, when they could say it, and indeed, turning them practically into abortion referral services.[18] (For those unfamiliar with the term, "crisis pregnancy centers," or "CPCs", are pro-life centers that counsel women on abortion alternatives and are listed in the *Yellow Pages* under the heading "abortion alternatives.").

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[15] *Id.*

[16] N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1992).

[17] *See, e.g.*, Maggie Gallagher, *The Right to Choose Life*, TOWNHALL, Feb. 12, 2002, http://www.townhall.com/columnists/MaggieGallagher/2002/02/12/the_right_to_choose_life; Michelle Malkin, *The Abortion Empire Strikes Back*, TOWNHALL, Jan. 11, 2002, http://www.townhall.com/columnists/MichelleMalkin/2002/01/11/the_abortion_empire_strikes_back.

[18] Pregnancy Res. Ctr., Inc. v. Spitzer, No. 103182-02 (Sup. Ct. N.Y. County Mar. 22, 2002).

Early on in his first term, Mr. Spitzer made clear his support for abortion rights and his willingness to use the office of the attorney general on one side of the abortion debate, setting up a new "reproductive rights unit" within the attorney general's office.

Speaking at a luncheon sponsored by the National Abortion Rights Action League ("NARAL") on the anniversary of *Roe* in 1999, the Attorney General declared[19]:

- NARAL's commitment was his commitment, and he promised to work closely with NARAL to make the reproductive rights unit "a model for the rest of the nation," committing "the full resources of [his] office to help ensure the success of the unit."
- One of his goals was to address what he termed "false advertisements for services."
- "I must act forcefully, and I intend to do so. With the creation of this unit, I want to send a clear message that this attorney general is committed to protecting and defending reproductive rights, and that we will respond with the full force of the law to any attempt to undermine those rights."
- "I am also determined to do all I can to restore a *suitable framework for public debate in New York.*"

The latter statement, in particular, strikes an ominous chord—what exactly did he mean by "a suitable framework for public debate in New York," and where exactly did the First Amendment to the Constitution of the United States fit into this "framework"?

NARAL, for its part, had authored a blueprint for its allies entitled "Unmasking Fake Clinics," which spoke of enlisting sympathetic state attorneys general. Basically, the plan was to send *agents provocateurs* into various crisis pregnancy centers, armed with false urine samples if necessary, and collect evidence of allegedly misleading conduct to turn over to the Attorney General. In the case of the center I represented, you had one

[19] The following quotes are from Mr. Spitzer's speech. Eliot Spitzer, N.Y. Attorney Gen., Remarks at the NARAL Luncheon (Jan. 22, 1999), http://www.oag.state.ny.us/press/1999/jan/jan22a_attachment_99.html (emphasis added).

ham-handed attempt by someone posing as a representative for a local community newspaper, *West Side Spirit*, calling shortly before closing time ostensibly to offer a low-cost advertisement to the center. The representative recited a list of what the center's services were purported to be—a recitation that included certain patently false representations—and asked for permission to run the alleged advertisement.[20]

Presumably armed with evidence such as this—his office would not disclose the factual basis for his investigation—the Attorney General issued roughly twenty subpoenas across New York State, from Staten Island to Buffalo, alleging false advertising (violations of the General Business Law) for *Yellow Pages* advertising that appeared under the heading "Abortion Alternatives" and the unlicensed practice of medicine—i.e., giving a woman an over-the-counter pregnancy test that one could buy at any local pharmacy or chain, which was then self-administered, after which the woman seeking counseling was asked to read the results herself. In addition, in the case of a minority of the centers, sonograms were performed which the expectant mothers viewed.

As an aside, one of the purported arguments against crisis pregnancy centers' using sonograms is that sonograms endanger the well being of the fetus. Apparently, some people utterly lack a sense of irony.[21]

As the subpoenas demanded to know who worked at these centers, lists of contributors, et cetera—an archetypal governmental intrusion capable of "chilling" free speech rights under the First Amendment and hence subject to strict scrutiny[22]—as well as to compel and restrict certain kinds of

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[20] The NARAL blueprint and the clumsy entrapment attempt are included in papers submitted in support of the motion to quash.

[21] As a further aside, while none of the subpoenaed CPCs were advertising under a listing in the *Yellow Pages* for "abortion," at least two abortion clinics at the time were listed under "abortion alternatives." This is something that I have observed on subsequent occasions as well. In none of those cases, however, am I aware of similar allegations of false advertising being brought by the Attorney General, though he was alerted to them.

[22] *See, e.g.*, Talley v. California, 362 U.S. 60, 60–61, 65 (1960) (declaring unconstitutional a city ordinance requiring disclosure of identities of anonymous pamphleteers); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 458–63 (1958) (observing that compelled disclosure of a group's membership lists is a substantial restraint upon the members' freedoms of association and speech); *cf.* Buckley v. Valeo, 424 U.S. 1, 69–74 (1976) (recognizing that mandatory disclosure of the names

speech based on the viewpoint of the speaker, all but one of the CPCs moved to quash the subpoena on First Amendment grounds.

The one that did not, entered into a consent decree. The day that happened, the Attorney General issued a press release declaring victory and withdrew all the other subpoenas.

Another case I handled which received less publicity (thankfully), involved two brothers, sincerely devout Catholics who regularly organized monthly holy hours and pro-life rosary vigils.[23] They also had a small party services business, serving as disc jockeys at bar mitzvahs and the like.

One day the business received a phone call from Gay Men's Health Crisis ("GMHC") asking them to host a fundraiser for the organization. They declined and, when pressed, they said that the reason was their opposition to GMHC's lobbying for certain positions antithetical to the teachings of the Catholic Church that they conscientiously adhered to. And, when further pressed, they specifically mentioned GMHC's very public policy of promoting condom distribution—a two minute phone conversation, end of story.

Or so they thought.

Two weeks later, the business received a subpoena from the Attorney General (improperly served) alleging, among other things, violations of New York's Human Rights Law, which basically reaches anyone doing business of any sort in the state and prohibits discrimination based on sexual orientation.[24]

Here, however, the issue was not sexual orientation—if we had to, we would have introduced evidence that the business in fact did not discriminate on the basis of orientation. The issue, rather, was the coercion of conscientious individuals to work at a fundraiser for, and give their implicit imprimatur to, an organization that had taken very public positions contrary to their sincere, deeply-held beliefs.[25]

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of donors to ideologically-oriented minority political parties might violate the First Amendment in certain situations, but finding that the factual showing required to contest the constitutionality of disclosure requirements was not met in the matter before the Court).

[23] Posillico v. Spitzer, No. 1300-06 (Sup. Ct. Nassau County), *withdrawn* (Mar. 22, 2006).

[24] N.Y. EXEC. LAW §§ 290–92, 296 (McKinney 2005 & Supp. 2007).

[25] See, for example, GAY MEN'S HEALTH CRISIS, GMHC ANNUAL REPORT 2002 (2003), http://www.gmhc.org/about/annual_report.html, which describes programs

Again, the Attorney General was picking sides—one of the top Health Care Bureau attorneys had been the former Managing Attorney and Associate Director for legal services to GMHC[26]—in a culture war, regardless of what the First Amendment says.[27] We moved to quash, and the subpoena was quietly withdrawn.

So where does that leave us?

I think the above examples, and what Professor Stabile described, illustrates the beginning skirmishes of a culture war over the right of conscience which will preoccupy the next generation.

I think the sides are drawn—again, you have very different moral narratives and different conceptions of "rights" and "justice."

The New Orthodoxy looks at "rights" *not* as being inalienable, based on the laws of Nature and Nature's God, but rather, as enactments of Positive Law, secured by acts of Government or, often, unelected judges.[28] Individual autonomy—the ability to define the "meaning of the universe" as extolled in *Planned Parenthood v. Casey*[29]—is sacrosanct, and mediating institutions like the Church and, indeed, even families, traditionally understood,[30] that stand between the Government and the Atomized Individual, or that crimp the liberties of the

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that distribute condoms to gay men, and Kelly Safreed Harmon, *Boundless Compassion (Ignore the Fine Print): Is Catholic Healthcare Stressing Dogma at Mercy's Expense?*, GMHC TREATMENT ISSUES, Sept. 2001, http://www.gmhc.org/health/treatment/ti/ti1509.html#1, excerpts of which were submitted in support of the motion to quash.

[26] See Press Release, Office of the N.Y. State Attorney Gen., Spitzer Names New Solicitor General, Makes Other Senior Staff Changes (Oct. 19, 2001), http://www.oag.state.ny.us/press/2001/oct/oct19a_01.html, appended in support of the motion to quash.

[27] Coerced speech is abhorrent to the First Amendment. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all . . . [and a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.").

[28] *See* Hogan, *supra* note 14.

[29] 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

[30] Hence the objection in certain quarters to laws that would require parental notification before a minor would be able to obtain an abortion.

Atomized Individual, are bad, and therefore their role in the public square must be reduced or even eliminated.[31]

"Justice" is then using agents of the Government—e.g., sympathetic state attorney generals—to eliminate threats to "equality" or "liberty," such as those who object, say, to same sex adoption or to paying for contraceptives/abortifacients.[32] Conscience cannot be allowed to stand in the way of the Just Society, as envisioned by the Coercive Utopians.[33]

There is, however, a danger when such mediating institutions are eliminated—if it is only the Government that defines and secures rights, then it can eliminate rights as well, and no buffer checking Government's power exists. Indeed, it can eliminate whole classes of people, redefining them as not fully human, and thus not entitled to protection of the law. *That* is why *Roe v. Wade* is an abomination—the weak and the vulnerable have no intrinsic rights. The Cult of the Atomized Individual is wonderful if you are Thrasymachus—the proponent of might makes right in Plato's *Republic*[34]—but less so if you are Terry Schiavo.

The Old Orthodoxy, however, views "rights," "justice," and "law" differently. Its proponents range from Dr. Martin Luther King[35] to the noble pagan Cicero.

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[31] *See generally* WILLIAM A. DONOHUE, TWILIGHT OF LIBERTY: THE LEGACY OF THE ACLU (1994); RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1986).

[32] As Professor Stabile has noted in her writings, FDA-approved "contraceptives" often function as abortifacients. Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 752 (2005).

[33] The term "Coercive Utopians" is borrowed from the title of a book published a number of years ago. *See* RAEL JEAN ISAAC & ERICH ISAAC, THE COERCIVE UTOPIANS: SOCIAL DECEPTION BY AMERICA'S POWER PLAYERS (1983).

[34] PLATO, THE REPUBLIC OF PLATO 18 (Francis MacDonald Cornford ed. & trans., 1941) ("What I say is that 'just' or 'right' means nothing but what is to the interest of the stronger party.").

[35] Letter from Dr. Martin Luther King, Jr., from Birmingham Jail (Apr. 16, 1963), *available at* http://www.stanford.edu/group/King/frequentdocs/birmingham.pdf.

> How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.

Indeed, perhaps none have stated the ancient credo as succinctly and eloquently as Cicero. "True law," says Cicero:

> [I]s Reason, right and natural, commanding people to fulfill their obligations and prohibiting and deterring them from doing wrong. Its validity is universal; it is immutable and eternal . . . Neither the Senate not the Assembly can exempt us from its demands; *we need no interpreter or expounder of it but ourselves.* There will not be one law at Rome, one at Athens, or one now and one later, but all nations will be subject all the time to this one changeless and everlasting law.[36]

"*We need no interpreter or expounder of it but ourselves.*" Taken out of context, that might sound like a call to relativism.[37] Rather, Cicero is speaking like another pagan exponent of the Natural Law, Confucius: "In the presence of a good man, think all the time how you may learn to equal him. In the presence of a bad man, turn your gaze within!"[38]

Id.

[36] Michael Grant, *Introduction* to CICERO, CICERO SELECTED WORKS 7–8 (Michael Grant ed. & trans., 1960) (emphasis added).

[37] Similarly, there are those who would take statements about conscience in John Henry Cardinal Newman's "Letter to the Duke of Norfolk"—"I shall drink—to the Pope, if you please—still, to Conscience first, and to Pope afterwards"—out of context. Letter from John Henry Newman, Cardinal, to the Duke of Norfolk (1900), http://www.newmanreader.org/works/anglicans/volume2/gladstone/section5.html. While an explication of Catholic teaching with respect to conscience is beyond the scope of this presentation, a well-formed conscience is one that "formulates its judgments according to reason, in conformity with the true good willed by the wisdom of the Creator," guided by the "authoritative teaching of the Church." CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1783, 1785 (2d ed. 1997). To quote Cardinal Newman more fully:

> Conscience has rights because it has duties; but in this age, with a large portion of the public, it is the very right and freedom of conscience to dispense with conscience, to ignore a Lawgiver and judge, to be independent of unseen obligations. It becomes a license to take up any or no religion, to take up this or that and let it go again, to go to church, to go to chapel, to boast of being above all religions and to be an impartial critic of each of them. Conscience is a stern monitor, but in this century it has been superseded by a counterfeit, which the eighteen centuries prior to it never heard of, and could not have mistaken for it, if they had.

Letter from John Henry Newman, *supra* note 37. Thus to place "Letter to the Duke of Norfolk," which the Catechism cites with approval, in opposition to the Church's understanding of conscience, is to impose one's predilections upon Cardinal Newman. *See* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 37, ¶ 1782.

[38] CONFUCIUS, THE ANALECTS OF CONFUCIUS 105 (Arthur Waley ed. & trans., 1938).

Why within?

Because *that* is the location of the heart, and it is on the heart, Confucius and his followers believed,[39] as did Jeremiah[40] and St. Paul,[41] that The Way, the *Tao*—the Natural Law—is written.

That is the domain of conscience.

So, then, what is the result when "Conscience Clashes with State Law & Policy," and what does it bode for the future?

I would leave you to ponder the observation of the French economist and proponent of negative rights, Frederic Bastiat, from his reflections upon the nature of Law entitled, appropriately, *The Law*: "When law and morality contradict each other, the citizen has the cruel alternative of either losing his moral sense or his respect for the law."[42]

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[39] D.C. Lau, *Introduction* to MENCIUS 14–19 (D.C. Lau trans., 1970) (discussing the significance to the Confucians of the heart, or *hsin*, as the locus of moral intuition); *see* Piero Tozzi, *Constitutional Reform on Taiwan: Fulfilling a Chinese Notion of Democratic Sovereignty*, 64 FORDHAM L. REV. 1193, 1198–1207 (1995) (comparing the Confucian and Aristotelian-Thomistic understandings of natural law).

[40] *Jeremiah* 31:33 (New American).

[41] 2 *Corinthians* 3:3.

[42] FREDERIC BASTIAT, THE LAW 8 (Kessinger Publ'g 2004) (1850), *available at* http://www.constitution.org/law/bastiat.htm.