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**WHAT IS WRITTEN IN THE LAW?
HOW DO YOU READ IT?
HOMILY AT THE RED MASS
PHILADELPHIA, PENNSYLVANIA
OCTOBER 8, 1996**

MONSIGNOR WILLIAM SMITH*

Normally, for a Red Mass, I explain that in preparation I scan the New Testament looking for references to lawyers. There are but three mentions in the singular¹ and four in the plural.² All these plural mentions are in St. Luke and all begin

* The Reverend Monsignor William B. Smith, S.T.D., delivered this homily at the Red Mass for lawyers in Philadelphia, Pa., which was celebrated in the Cathedral of Saints Peter and Paul by His Eminence Anthony Cardinal Belvilaqua on October 8, 1996. Among the many participants were the Governor, the two United States Senators, the Justices of the Supreme Court of Pennsylvania, and numerous federal and state judges. Monsignor Smith is Professor of Moral Theology at St. Joseph's Seminary, Dunwoodie, New York.

¹ *Matthew* 22:35 ("But when the Pharisees heard that he had silenced the Sadducees they got together and, to discomfort him, one of them [a lawyer] put a question, 'Master, which is the greatest commandment of the Law?' Jesus said, 'You must love the Lord your God with all your heart, with all your soul, and with all your mind'"); *Luke* 10:25 ("There was a lawyer who, to disconcert him, stood up and said to him, 'Master, what must I do to inherit eternal life?'""); *Titus* 3:1 ("Remind them that it is their duty to be obedient to the officials and representatives of the government").

² *Luke* 7:30 ("[B]ut by refusing baptism from him the Pharisees and the lawyers had thwarted what God had in mind for them."); *Luke* 11:45-46 ("A lawyer then spoke up. 'Master,' he said 'when you speak like this you insult us too.' 'Alas for you lawyers also,' he replied 'because you load on men burdens that are unendurable, burdens that you yourselves do not move a finger to lift.'"); *Luke* 11:52 ("Alas for you lawyers who have taken away the key of knowledge! You have not gone in yourselves, and have prevented others going in who wanted to."); *Luke* 14:3 ("Jesus addressed the lawyers and Pharisees. 'Is it against the law' he asked 'to cure a man on

the same way: "Woe to you lawyers" Then again, St. Luke, we know, was a physician.³ Perhaps some interprofessional tensions go back much further than we think.

But, in the gospel *Luke* 10:25-28 there is a lawyer's question: a question from a lawyer and a question put to that lawyer. This is standard rabbinic procedure: ask a good rabbi a question and invariably, a good rabbi will ask you a question.

St. Luke writes: "On one occasion a lawyer stood up to pose Him this problem: "Teacher, what must I do to inherit everlasting life?"⁴ Since you walk and work in legal circles, and I do not, I leave to you to judge the likelihood or frequency of a lawyer asking that question today.

But, the answer to that question deserves frequency today for it is pertinent to lawyers and non-lawyers alike. In standard rabbinic fashion, the Lord Jesus answers the question by asking a question: "What is written in the law? How do you read it?"⁵

What is written in the law? How do you read it? Today, you can read a great deal about the law, as you can read much about your own learned profession. Every Friday, the *New York Times*, a local newspaper in my area, offers both a column and a signed article about some aspect of the legal profession—some friendly, some not. Some time ago, I read a jarring comment from a Nevada Circuit Court Judge who had no doubts about removing life support from a non-dying but comatose woman—his charming opinion, which I quote, was: "The problem is not what to do with her but to find some way to do it and make it look good."⁶ That droll answer is not worthy of any learned profession.

We can read as well many voices and concerns about legal ethics. One author states the challenge: "[There] is the virtually unanimous agreement that the moral traditions of the profession should be continued rather than compromised."⁷ But, the author continues: "What is also not clearly established in this rebirth of legal ethics is the presence or depth of a moral philosophy that

the sabbath, or not?").

³ *Colossians* 4:14.

⁴ *Luke* 10:25.

⁵ *Luke* 10:26.

⁶ Peter Steinfelds, *Judges Anguish Over Medical Issues*, N.Y. TIMES, Sept. 11, 1989, at A19 (quoting Nevada Circuit Court Judge Addeliar D. Guy, 3d.).

⁷ Robert F. Drinan, *The Flowering of Legal Ethics in America*, AMERICA, Aug. 19, 1989, at 77 (professor of law at Georgetown University Law Center examining legal ethics in United States).

can guide the legal profession in the choices it must make in its responses to exquisitely complicated moral problems."⁸

Moral philosophy; Higher Background of Law; our Common Judeo-Christian Ethic; the Natural Law; Natural Human Rights; call it what you will, but I would ask you today to consider: What is written in that law? How do you, how can you read it?

Let me be entirely candid, as sure as God made green apples, if we get legalized euthanasia in this country, the point of entry will be that back door called 'assisted suicide.' If not the legalization, at least the de-criminalization of assisting a suicide.

That's how it will come and its coming was greatly advanced this calendar year by the Ninth Circuit Court of Appeals in *Compassion in Dying v. Washington*,⁹ and by the Second Circuit Court of Appeals in *Quill v. Vacco*.¹⁰ Recently, the U.S. Supreme Court accepted these decisions for final review.¹¹

I would prefer not to be misunderstood. I am not talking about the removal or withdrawal of futile or redundant measures from a dying patient whose inevitable death is imminent. That is already possible; that already is and can be good law, good morals, and good medicine. But in some jurisdictions, it is no longer a question of removing a once hoped-for cure, but removing basic care and the next crucial step—a positive act that terminates life.

What is the law on that? How do you read it? I do not suggest that there are no good things to read, there are. In my home State of New York, a highly diverse State Task Force on Life & the Law published, in May 1994, a 217 page report, *When Death Is Sought*,¹² with their unanimous (24-0) recommendation

⁸ *Id.*

⁹ 79 F.3d 790 (9th Cir.), *cert. granted sub nom.*, *Washington v. Glucksberg*, 65 U.S.L.W. 3085 (U.S. Oct. 1, 1996) (No. 96-110).

¹⁰ 80 F.3d 716 (2d Cir.), *cert. granted*, 65 U.S.L.W. 3795 (U.S. Oct. 1, 1996) (No. 95-1858).

¹¹ *Vacco v. Quill*, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996) (No. 95-1858); *Washington v. Glucksberg*, 65 U.S.L.W. 3085 (U.S. Oct. 1, 1996) (No. 96-110).

¹² NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT* (1994). The mission of the Task Force, established in 1985 by Governor Mario Cuomo, is to develop proposals on issues concerning medical advances and life sustaining treatment. The Task Force's twenty five members include doctors, lawyers, academics, and representatives of the religious community. *Id.*

NOT to change nor relax the criminal laws in our State against assisting a suicide.

On the other hand, while I can neither agree with nor accept the judgment of the Ninth Circuit Court in *Compassion in Dying*, I do recommend that legally competent people read that decision, for it is nothing less than amazing.

First example, in footnote 25, the Ninth Circuit calmly informs the reader:

In the New Testament, the suicide of Judas Iscariot is not treated as a further sin, rather as an act of repentance.¹³

As a priest and a citizen, I have sometimes wondered just what were the outer limits of the reach of the Federal Judiciary. I have heard of 'conservative' biblical interpretation, 'liberal' biblical interpretation, but here we have 'Federal' biblical interpretation. Here, I am calmly assured by the Ninth Circuit as to the meaning and reading of *Matthew 27:5*.¹⁴ Unfortunately, this forces me to erase the tape on 4 verses in the *Book of Acts 1:16-20*¹⁵ as to the correct reading of *Matthew 27:5*—perhaps this is a new Wall-of-Separation, the separation of the texts one from another!

The same court's porous history of ethics and suicide next tells me it was St. Augustine's "utilitarian concern that the 'rage for suicide' would deplete the ranks of Christians" that forced Augustine to conclude that suicide was a "detestable & damnable

¹³ *Compassion in Dying*, 79 F.3d at 808 n.25.

¹⁴ *Id.*

¹⁵ *Acts 1:16-20*.

'Brothers, the passage of scripture had to be fulfilled in which the Holy Spirit, speaking through David, foretells the fate of Judas, who offered himself as a guide to the men who arrested Jesus—after having been one of our number and actually sharing this ministry of ours. As you know, he bought a field with the money he was paid for his crime. He fell headlong and burst open, and all his entrails poured out. Everybody in Jerusalem heard about it and the field came to be called the Bloody Acre, in their language Hakeldama. Now in the Book of Psalms it says:

*Let his camp be reduced to ruin,
Let there be no one to live in it.*

And again:

Let someone else take office.

Id.

wickedness."¹⁶

Only someone completely ignorant of Augustine's classic work, *The City of God*, Book I, chapter 20, could assert that his concern was 'utilitarian.' As for any "rage for suicide" in the early Fifth Century, I have no idea where that assertion comes from except perhaps that some clerk invented it.

Thirdly, we are told in the text and footnote 29 that Sir Thomas More in his book, *Utopia*, "strongly supported the right of the terminally ill to commit suicide."¹⁷ Apart from this marvelously inventive terminology, it should be of interest to the St. Thomas More Society, which sponsors this Red Mass, that your patron, St. Thomas More, has made it this year in the Ninth Circuit.

However, St. Thomas More's book, *Utopia*, was a satire. Indeed, in Book II of *Utopia*, it was not More who advocated suicide, but his literary foil *Raphael Hythlodæus* who argues for suicide. *Hythlodæus*, in Greek (ὕθλος = nonsense) is not a person but a pun. *Hythlodæus* means 'speaker of nonsense!' More used the pun to make sure that his readers did not miss the point which is apparently what the Ninth Circuit did in the extreme.

Perhaps some clerk got entangled in his 'Work Check.' But I would hope that the level of general education has not fallen so low that judges would write as 'history'—honored words, names, and persons that they did not check out at all.

But, the most revealing and dangerous ethical collapse in the reasoning of the Second and Ninth Circuits—the same Fourteenth amendment, albeit for different reasons: 'ordered liberty' in the Due Process Clause for the Ninth Circuit; the Equal Protection Clause for the Second Circuit—is their clear denial and repudiation of the ethically significant distinction between killing by positive act and allowing someone to die.

As an American, I have no urge to impose on anyone what some might take to be sectarian language; i.e., it is ethical to forego 'extraordinary treatment' as morally optional, while to forego the 'ordinary' is unethical since that is morally obligatory care and/or treatment.

But, the assisted suicide agenda does not stop, or even

¹⁶ *Compassion in Dying*, 79 F.3d at 808.

¹⁷ *Id.*

pause, over discussions of omissions only. It is the legal sanction of a radically different step—a positive act that kills.

Two courts claim to see no relevance, no rational basis, to distinguish between turning off a respirator that has become futile or redundant in a given case that allows an advanced disease to cause death naturally, and, a positive act, the delivery of a lethal dose, that actually causes death.

This distinction is as crucial as the difference is real. I doubt that there is a sober doctor or nurse in the USA who does not know the difference from clinical experience. Are there hard cases? Sure there are! Are there some hardship cases? Sure! Are there some head-scratching cases that would prompt the most experienced clinician to seek the counsel of another opinion? Sure.

But to claim that there is no causal or ethical difference between death by natural causes and say, the administration of potassium cyanide, or the more exotic Michigan option of carbon monoxide in VW vans—cyanide has no therapeutic benefits; filling a van with carbon monoxide is not a medical procedure. It is not only anti-intuitive but anti-empirical to describe them as such.

I would not ask anyone to accept the *double effect* terminology simply because it is familiar Catholic terminology. But again, it is the Ninth Circuit, in footnotes 94, 95, & 96, that takes it upon itself to explain *double effect* to American jurists.¹⁸ Indeed, footnote 95 quotes no less than Dr. Timothy Quill to explain the Roman Catholic usage. Dr. Quill, in New York, is the Brooks Brothers version of Michigan's Dr. Kevorkian.¹⁹ The

¹⁸ *Id.* at 823 n.94, 95, & 96. Judge Kleinfeld describes the 'double effect' as giving medication to a terminally ill patient to relieve pain that may have the effect of shortening the patient's life. The primary motive for the medication is relief of pain. The secondary effect may be shortening the terminally ill patient's life. *Id.* (citing Council on Ethical and Judicial Affairs, American Medical Association, 54 *Decisions Near the End of Life*, 267 J. AM. MED. ASS'N (Apr. 22-29, 1992).

¹⁹ In his book, *DEATH AND DIGNITY* (1993), Dr. Timothy E. Quill explains why he decided to advocate physician-assisted suicide.

Dr. Quill was investigated by the New York Health Department and by a grand jury for failing to report the cause of death of a patient by overdose from pain medication that Dr. Quill had prescribed. Neither investigation led to actual charges being filed. Dr. Quill, unlike Dr. Kevorkian, was not present at the death of his patient. See Patrick Jordan, *Comfort Care Options*, COMMONWEAL, July 16, 1993, at 22-23.

Ninth Circuit tells us *double effect* means: “it is ... justifiable to cause evil in the pursuit of good.”²⁰ Wrong. They have it entirely wrong.

Indeed, Judge Kleinfeld in dissent said: “The majority” has it “exactly wrong Knowledge of an undesired consequence does not imply [nor] intend[] that consequence.”²¹ Judge Kleinfeld gave a clarifying example understandable to all Americans. When General Eisenhower gave the order to invade the beaches of Normandy, the General and his staff foresaw the death of many, even thousands, of American and Allied soldiers. His intention was to liberate the beach, liberate France, and liberate Europe from the Nazis. He foresaw consequences (in this case heavy casualties) but it is unreal and unfair to describe Eisenhower as the killer of Americans.²² Judge Kleinfeld notes that the double effect reasoning is not novel, it is more ancient than Catholicism, it goes back to Aristotle, *Rhetoric*, Book I, chapter 13 at column 79.²³

Again, it’s not what we call this reasoning that’s crucial, rather I would ask anyone to look at the logic and ethics of causation here. It is not a religious scruple to state that there is great ethical difference and significance between allowing death through natural causes and causing death through deliberate human agency.²⁴ Deliberate killing is no part of the ethical practice of medicine.

What is written in the law? How do you read it? Civil laws—the statutes of our Fifty States, the legislation of our Congress, or the decisions of our highest courts—all such laws and decisions are human in origin and thus never absolutely perfect.

And because they are human in origin, they require some test, some check, some standard to make sure such laws are truly fair and truly just. To make sure they are true.

Human enactments are not automatically self-validating. They do not always contain within themselves the proof of their own justice and fairness.

²⁰ *Compassion in Dying*, 79 F.3d at 823 n.95.

²¹ *Id.* at 858 (Kleinfeld, J., dissenting).

²² *Id.*

²³ *Id.*

²⁴ The same valid distinction is carefully delineated in THE COUNCIL ON ETHICAL & JUDICIAL AFFAIRS OF THE A.M.A., CODE OF MEDICAL ETHICS (1996-1997). See *id.* at 39 n.2.20, 55 n.2.21, and 56-57 n.2.211.

For some people the criterion will be public acceptance—what the public widely accepts must be good law. For others the test might be utility—what is useful to the State, useful to the Body Politic.

However, the German public (1933-1945) by and large acceded to Hitler's civic racial laws (cleansing blood lines, improving Aryan types) that guaranteed a 'final solution' for the Jews of Europe and others deemed unwanted. Some saw immediately where this was leading; many others never got it or pretended not to notice. Maybe the average citizen couldn't say or do very much, but the record is not exactly chocked with noisy protests to the contrary.

Joseph Stalin's 'legal decrees' authorized massacres in Georgia, organized starvation in Ukraine, and other gigantic atrocities only now being documented for the first time. Perhaps, these 'legal decrees' were deemed useful to the State, or at least useful to the Central Committee.

The only really serious objection to these 20th Century pieces of human law-making was that they could not be squared with the Law of God nor with Reality. What was needed in Germany in the '30s, or Russia in the '40s, or Capetown in the '70s, or in some circuits today is a lawyer or someone to proclaim the Natural Law of God or of Reality so loud and so clear that people should hear what is right and not forget it.

The expected objection is already in our society a duly registered trademark: Who is to say what is God's Law? Does not God's Law always come wrapped in sectarian and denominational packaging?

This presents a bit of a dilemma; but a dilemma only if you think that God's Law comes written only in written form: the Ten Commandments from Mt. Sinai²⁵ or the Sermon on the Mount in *Mt.* 5, 6, & 7.

I acknowledge and revere God's written Law from both of those sacred sources. But there is another Law whose source is creation, this we don't need written Revelation, we don't even have to know how to read, all we need to do is reason about reality in front of us.

There are certain basics about human nature and the nature

²⁵ *Exodus* 20; *Deuteronomy* 5.

of the human person that are not bestowed upon us by any Committee, any Congress, any Court, nor by any prophet, Jewish or Christian. Some have called them 'inalienable rights' that belong to human beings precisely because they are human beings. Our Founding Fathers thought some of them so transparently clear that they called them self-evident truths, self-evident rights that belong to you if you belong to our human race; the first among them being "the right to life, liberty and the pursuit of happiness."

But as Bishop Edward Egan once pointed out to a national meeting of the A.B.A., even our enlightened Founding Fathers stumbled into an intolerable compromise, when on September 17, 1787, in this City of Philadelphia, they put their signatures to one of the most important documents in Western History—the U.S. Constitution.

In Article I, section 2 of the original constitution, a grievous injustice was approved and compromised. Slaves (black men and women in bondage) were, for purposes of representation in and taxation by Congress, to be considered $\frac{3}{5}$ of a person.

The $\frac{3}{5}$ ths formula was agreed upon three years before as a compromise. Northern states felt that the South would be over-represented in Congress if slaves were counted full; and southern states felt that they would be overtaxed for the same reason. So they struck a compromise in our fundamental law that slaves were $\frac{3}{5}$ ths of a person.

It took eighty-one years and a Civil War to correct that mistaken man-made legislation and bring it into conformity with God-made reality. Clearly, God never created $\frac{3}{5}$ ths of a person; only a political compromise could invent that and we paid for that mistake in a bloody Civil War with the loss of 465,000 American lives.

No person is ever a fraction of a person. All human persons are sons and daughters of God made in His image and likeness. If they are not human persons, then they belong to another, to a different species. Our kind comes only in one kind—human kind. It never comes in fractions or percentages.

There may be no more fundamental question—Who is part of the human community? Who is a one of us? And when it comes, and it will come, when some suggest that everyone of us is so specifically unique, so absolutely individually autonomous

that we are not bonded to or with each other by nature—that any one of us is so autonomous that he or she can self-destruct and that should concern no one else, when that time comes, I hope someone stands up and asks: *What is written in the Law? And how do you read it?*

Not just God's written Law, written in the Bible, but the Law of Nature and the Law of Life—written in the heart and the head of anyone who can read reality.

There is an older question—a question much older than our Constitution, and older than this Gospel. It is a question you heard long before you went to any school, surely before law school: "Am I my brother's keeper?"²⁶

There was a time in this country when everyone knew the answer, the correct answer to that question. No question can be more fundamental because it means: Am I my brother's brother? If so there is no 'right' to kill him or assist his self-destruction; if not, it does not matter because he (it) is another, a different species.

Am I my brother's brother? That is a current question, a crucial question. I hope we don't get another 3/5ths of an answer. Think it through—there is no more important question than Who Is One Of Us?

What is written in the law? How do you read it? The lawyer who first answered that rightly received the following answer from Jesus Christ: "You have answered correctly; do this and you shall live."²⁷

It is the same for us, the same today, the same forever—do this and you shall live, as shall all other innocents of our kind.

²⁶ *Genesis* 4:9.

²⁷ *Luke* 10:28.