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CATHOLIC LAWYERS IN AN AGE OF SECULARISM

THE HONORABLE DIARMUID F. O'SCANNLAIN*

Your Excellency Bishop Fiorenza, Reverend Clergy, Distinguished Judges, Lawyers, and Public Officials, Chairman Nichols, Ladies and Gentleman, it is a pleasure to be here this evening.

Thank you, Judge Smith, for your very kind introduction. Judge Smith, as many of you already know, is a jurist of uncommon character and national renown. You are fortunate to have him as a judge of the United States Court of Appeals for the Fifth Circuit, and I am fortunate to count him as a friend. I would also like to thank Your Excellency for celebrating the Red Mass this evening, and for the opportunity for me to speak in your diocese, and I thank you, Eric Nichols, and your organizing committee for extending such warm hospitality to my wife Maura and me. As I review the names of those who have preceded me as banquet speaker in years past, I am profoundly honored for the invitation to share some reflections with you this evening.

The theme of my talk is a question that each of us might well ask: Can one be a good Catholic and a good lawyer at the same time, and if so, how does one manage to do so? Such questions are not new, but each generation of Catholic lawyers seems to ask them anew, always in light of the particular struggles and circumstances of their time. Consider, for example, this rather colorful passage in Cardinal Newman's

* United States Circuit Judge, United States Court of Appeals for the Ninth Circuit. This reflection was presented at the Red Mass Banquet of the Diocese of Galveston-Houston on October 1, 2003 in Houston, Texas. The views expressed herein are my own and do not necessarily reflect the views of my colleagues or of the United States Court of Appeals for the Ninth Circuit. I would like to acknowledge, with thanks, the assistance of Mark E. Schneider, my law clerk, in preparing these remarks.

account of the eighteenth century life of St. Alphonsus Liguori, who had just left law practice for the priesthood:

[H]e was originally in the Law, and on one occasion he was betrayed into the commission of what seemed like a deceit, though it was an accident; and that was the very occasion of his leaving the profession and embracing the religious life Alfonso would listen to nothing, but, overwhelmed with confusion, his head sunk on his breast, he said to himself, 'World, I know you now; courts of law, never shall you see me again!'¹

Even today, a Catholic lawyer might understandably be tempted, as was Liguori, to sink his head into his breast and flee the profession. In addition, there are others, many of whom are not practicing Catholics, who appear, shall we say, a bit eager to rid the bar, or at least the courts, of professing Catholic jurists. And so this evening, I propose to examine what guidance history offers on *whether*, and if so, *how*, one can seek sanctity as a Catholic while engaged in the legal profession in today's culture.

Let's begin in thirteenth-century Brittany, France, in the diocese of Treguier, where Ervoan Heloury Kermatin was born.² Kermatin is better known today as St. Ives,³ and I am thankful that St. Ives of Brittany is the patron saint of lawyers as opposed to the great martyrs like St. Thomas à Becket or St. Thomas More.⁴ One enduring Latin ditty captures the esteem in which St. Ives was held:

Sanctus Ivo erat Brito,
Advocatus et non latro,
Res miranda populo.⁵

For those whose Latin has grown a bit rusty, we might rather loosely translate:

St. Ives was from the land of beef;

¹ JOHN HENRY CARDINAL NEWMAN, *APOLOGIA PRO VITA SUA* 270–71 (1950).

² See John H. Wigmore, *St. Ives, Patron Saint of Lawyers*, 18 A.B.A. 157, 157 (1932).

³ *Id.*

⁴ See *id.* at 160 ("He was made a calendar-saint, not [like so many] because he was a martyr at the stake, nor merely because he was a faithful servant of the Church, but because from his adult youth for thirty-five years he lived consistently an ideal life of service and sacrifice in the cause of Justice.").

⁵ *Ivo of Kermartin*, at <http://www.saintspreserved.com/Ivo.html> (last visited Mar. 24, 2004).

A lawyer, and not a thief;
A stretch on popular belief.⁶

Now, not being a thief is a good place to start. Most of us hopefully pass at least that threshold! However, more importantly, he was also an exceptionally skilled advocate. We know a surprising amount about St. Ives, much of it documented in the exhaustively detailed canonization proceedings, but we only know the legal details of a single piece of litigation, the celebrated case of the *Widow of Tours*.⁷ To set some context, Ives was completing his legal training in Orleans and would lodge in Tours while visiting the court there.⁸ Let me read you a 1932 American Bar Association Journal account of the ancient case, and I quote:

One day [Ives] found his widow-landlady in tears. Her tale was that next day she must go to court to answer to the suit of a traveling merchant who had tricked her. It seemed that two of them, Doe and Roe, lodging with her, had left in her charge a casket of valuables, while they went off on their business, but with the strict injunction that she was to deliver it up again only to the two of them jointly demanding it. That day, Doe had come back, and called for the casket, saying that his partner Roe was detained elsewhere, and she in good faith in his story had delivered the casket to Doe. But then later came Roe demanding it, charging his partner with wronging him, and holding the widow responsible for delivering up the casket to Doe contrary to the terms of their directions. And if she had to pay for those valuables it would ruin her. "Have no fear," said young [Ives], "You should indeed have waited for the two men to appear together. But I will go to court tomorrow for you, and will save you from ruin." So when the case was called before the Judge, and the merchant Roe charged the widow with breach of faith, "Not so," pleaded [Ives], "My client need not yet make answer to this claim. The plaintiff has not proved his case. The terms of the bailment were that the casket should be demandable by the two merchants coming together. But here is only one of them making the demand. Where is the other? Let the plaintiff produce his partner!" The judge promptly approved this plea. Whereupon the merchant, required to produce his fellow, turned pale, fell a-trembling, and would

⁶ *Id.*

⁷ Wigmore, *supra* note 2, at 157.

⁸ *Id.*

have retired. But the judge, suspecting something from his plight, ordered him to be arrested and questioned; the other merchant was also traced and brought in, and the casket was recovered; which, when opened; was found to contain nothing but old junk. In short, the two rascals had conspired to plant the casket with the widow, and then to coerce her to pay them the value of the alleged contents. Thus the young advocate [indeed] saved the widow from ruin.⁹

As this excerpt reveals, it seems that Ives was an ingenious, as well as a creative, lawyer. Thus, probably like many lawyers here in Houston tonight, this first big case made his reputation. Though Ives studied in Paris and Orleans with the leading scholars of the day, including the celebrated civil law scholar Pierre de la Chapelle,¹⁰ and with fellow students such as the future scholars John Duns Scotus and Roger Bacon,¹¹ he would ultimately win praise and be known not for scholarship but rather by the epithet "*Advocatus pauperum*,"¹² the "Advocate of the Poor."¹³ The ascetical habits of his student days stayed with him throughout his life; he lived with the barest necessities, dressed humbly, slept on a pallet of straw, abstained from wine and meat, and continually gave away his money, garments, and food to the poor.¹⁴

Moreover, Ives did not accept payment from his clients. He did insist upon something else, however—something that might have steered some of today's lawyers away from participating in the wave of fraud-induced bankruptcies that have littered our economic landscape. He asked each client to swear an oath, on his or her conscience, that his or her cause was a just one.¹⁵ Only then would Ives declare, "'Pro Deo te adjuvabo,' ('For the sake of God, I will help you')" and take the case.¹⁶ Now it has been seventeen years since I have counseled clients myself, but

⁹ *Id.* at 157–58.

¹⁰ *St. Ives, Illuminated Manuscript*, at <http://www.saintspreserved.com/Ivoscroll.html> (last visited Mar. 24, 2004).

¹¹ Wigmore, *supra* note 2, at 157.

¹² *Id.* at 158.

¹³ *St. Ives, Illuminated Manuscript*, at <http://www.saintspreserved.com/Ivoscroll.html> (last visited Mar. 24, 2004).

¹⁴ See BUTLER'S LIVES OF THE SAINTS 351–52 (Herbert Thurston, S.J. & Donald Attwater eds., 1963); Wigmore, *supra* note 2, at 157.

¹⁵ Wigmore, *supra* note 2, at 158.

¹⁶ *Id.*

my perspective from the bench is that such oaths could quickly clear the backlog on our Ninth Circuit docket!

One could say much more about Ives—about his great learning, about his passion for justice as an ecclesiastical court judge in Brittany,¹⁷ about how even as a judge he continued to plea for his helpless clients in other courts,¹⁸ or about his prominence as a mediator, who ended many lawsuits before they began—no doubt a pioneer of alternative dispute resolution, (“ADR”), something that garners the appreciation of any modern judge.¹⁹ Although ultimately he was ordained a priest,²⁰ built a hospital for the poor,²¹ and gained recognition as a preacher,²² he nonetheless maintained his legal practice, dying exhausted at age fifty.²³

Ives presents a compelling model to me, not only because he lived a blameless life, really a sacrificial life in many respects, but because he acted as a lawyer—and humbly did the work that God put before him—with great skill and perseverance. He was neither a martyr nor a Lord Chancellor of England. His example reveals that lawyers, even in their ordinary and mundane work, do something that can be sanctifying. Even in the face of today’s cultural struggles, we shouldn’t lose sight of the simpler, more modest, witness of Ives. His trademark was complete honesty—honesty in his legal causes and honesty in the vocation God created him to pursue.

Let’s move next to the late fifteenth century world into which young Thomas More was baptized in 1478.²⁴ By this time, the tradition of the Red Mass in England had taken hold, having begun in the century 1310 under the reign of Edward I.²⁵ Attended by the clergy and the court, both robed in red, the Red

¹⁷ See *St. Ives, Illuminated Manuscript*, at <http://www.saintspreserved.com/Ivoscroll.html> (last visited Mar. 24, 2004).

¹⁸ *Id.*

¹⁹ BUTLER’S LIVES OF THE SAINTS, *supra* note 14, at 352.

²⁰ *Id.*

²¹ *St. Ives, Illuminated Manuscript*, at <http://www.saintspreserved.com/Ivoscroll.html> (last visited Mar. 24, 2004).

²² BUTLER’S LIVES OF THE SAINTS, *supra* note 14, at 352; Wigmore, *supra* note 2, at 158.

²³ BUTLER’S LIVES OF THE SAINTS, *supra* note 14, at 352.

²⁴ See PETER ACKROYD, *THE LIFE OF THOMAS MORE* 3–7 (1998).

²⁵ See Press Release, The Catholic Diocese of Cleveland Foundation, Patrick McCartan to be Honored by Catholic Lawyers Guild, at <http://www.oce.org/news/redmassMcCartan2003.htm> (last visited Mar. 24, 2004).

Mass marked the opening of the court term. The liturgical red, inspired by the Holy Spirit, symbolized the commitment of the Church to defend the truth. The defense of truth, ultimately, became the cause of St. Thomas More's martyrdom.

I note, incidentally, that our event this evening is co-sponsored by the St. Thomas More Society of Houston, so I won't recount the details of More's life, because its contours are undoubtedly known to you—if not by Peter Ackroyd's masterful biography, then at least by Robert Bolt's exceptional play, *A Man for All Seasons*. A reproduction of the familiar Hans Holbein portrait of More hangs in my chambers, and for me, as probably for many of you in Texas, More's example commands our attention because his life story fascinates us. In recently re-reading the Ackroyd biography, I was struck by his observation that Thomas More was born on Milk Street, the same London block where his predecessor Thomas à Becket once lived—several centuries apart, but a mere twenty yards from the other.²⁶ Each attained the rank of Lord Chancellor and exercised great earthly power,²⁷ the likes of which St. Ives was unfamiliar. Both Becket and More endured martyrdom for their defense of the integrity of the Church and the truth of its teaching.²⁸

In some sense, each of us as lawyers is born—or, as Catholics, baptized—on the same city block as Becket and More. Even though church and state are situated differently today than in medieval England—and we are fortunate for that—the temptation will always persist to subordinate religious truth to political or other expedients founded in secular values. Those with the training in advocacy and the habits of mind that our profession requires have a special opportunity to stand up and to bear witness when such values collide.

A Man for All Seasons concludes with a short passage that I wish to share with you. The context, as you will recall, is that

²⁶ ACKROYD, *supra* note 24, at 6–7.

²⁷ See *St. Thomas More*, NEW ADVENT, CATHOLIC ENCYCLOPEDIA, at <http://www.newadvent.org/cathen/14689c.htm> (last visited Mar. 24, 2004); *Thomas A. Becket*, in PATRON SAINTS INDEX, at <http://www.catholic-forum.com/saints/saintt09.htm> (Mar. 24, 2004).

²⁸ See *Thomas A. Becket*, NEW ADVENT, CATHOLIC ENCYCLOPEDIA, at <http://www.nationmaster.com/encyclopedia/Thomas-Becket> (last visited Mar. 24, 2004); *St. Thomas More*, *supra* note 27, at <http://www.newadvent.org/cathen/14689c.htm>.

More resigns his Chancellorship when Henry VIII breaks with the Church in 1531 after the Pope refuses to grant a divorce from Catherine of Aragon.²⁹ Parliament responds with a bill requiring all the Kings' subjects to swear to the supremacy of the King over all sovereigns, including the Pope.³⁰ More refuses.³¹ Richard Rich betrays him with false testimony, the price of which, famously, was the attorney generalship—of Wales of all places.³² More then thanks his executioner and is beheaded.³³ At the end, Common Man, an observer of sorts, appears, removes his mask, and offers the following reflection before the curtain drops:

I'm breathing . . . Are you breathing too? . . . It's nice, isn't it? It isn't difficult to keep alive, friends—just don't *make* trouble—or if you must make trouble, make the sort of trouble that's expected.³⁴

As those lines reveal, More, it turns out, was not afraid to make some trouble when trouble needed to be made, and lawyers are generally pretty good at making trouble. A quotation by Thomas Jefferson is carved into the stone of my Portland courthouse; it reads, “[t]he boisterous sea of liberty is never without a wave.”³⁵ Nonetheless, even though Catholicism, lived in its richness, can at times create deep conflict with many of the values of the secular world, it is very easy not to make trouble—not to make waves. Yet, More's lesson, by my reading, is that as

²⁹ See *St. Thomas More*, *supra* note 27, at <http://www.newadvent.org/cathen/14689c.htm>.

³⁰ See *Henry VIII*, in NEW ADVENT, CATHOLIC ENCYCLOPEDIA, at <http://www.newadvent.org/cathen/07222a.htm> (last visited Mar. 24, 2004).

³¹ *St. Thomas More*, *supra* note 27, at <http://www.newadvent.org/cathen/14689c.htm>.

³² You might recall the famous exchange:

MORE: I *have* one question to ask the witness. That's a chain of office you are wearing. May I see it? The red dragon. What's this?

CROMWELL: Sir Richard is appointed Attorney-General for Wales.

MORE: For Wales? Why, Richard, it profits a man nothing to give his soul for the whole world . . . But for Wales!

ROBERT BOLT, *A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS* 158 (Vintage Books 1990) (1962) (stage direction omitted).

³³ See PETER ACKROYD, *THE LIFE OF THOMAS MORE* 406 (1998); see also ROBERT BOLT, *A MAN FOR ALL SEASONS* 162 (1960); BOLT, *supra* note 32, at 162.

³⁴ BOLT, *supra* note 32, at 162–63.

³⁵ Michael Mooney, Address at the Lewis & Clark College of Arts and Sciences 2002 Commencement Ceremony (May 12, 2002), at http://www.lclark.edu/dept/public/pres_comm2002.html.

Catholic lawyers we have obligations that transcend the secular order, and that sometimes means that making trouble is not so bad. For those of you called to positions of more public leadership—an admirable calling—Thomas More can be a sound guide.

Next, let's fast forward to the founding of our own country in the late 1700s. Even if this event involved a great many lawyers, it was not necessarily a particularly Catholic moment. However, it did represent a flowering of religious liberty and was an occasion of much thought on the place of religious obligation and belief in public life. What stands out most clearly from that era is the unshakeable belief of the Founders that the project of our young republic depended upon certain republican virtues, and that those were grounded in deeply held religious belief.

The First Amendment, of course, protected free exercise of religion and barred any federal establishment of religion.³⁶ Yet the same Founders were comfortable invoking God's help and recognizing his divine authority—and did so in a non-proselytizing way. The Declaration of Independence explains, of course, that "W[e] hold these Truths to be self-evident, that all Men are created equal, that they are endowed *by their Creator* with certain unalienable Rights . . ."³⁷ Religious services were held in the Capitol building itself—even, one might emphasize, during Thomas Jefferson's presidency.³⁸ The oaths sworn by public officials, like the oath sworn by the Texas lawyers in this room, concluded with the plea, "so help me God."³⁹ In fact, as my Tenth Circuit colleague, Michael McConnell, has documented, nine of the thirteen *states* had some form of religious establishment as the American Revolution began.⁴⁰ When the First Amendment was adopted, about half the states had some form of established religion. While 170 years have now passed since any state has had an official state religion, the debate over official establishment and disestablishment was vigorous and by

³⁶ See *Lee v. Weisman*, 505 U.S. 577, 620 (1992) (Souter, J., concurring).

³⁷ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

³⁸ J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?*, 2001 BYU L. REV. 755, 768 (2001).

³⁹ See Commentary on the "Oath" and Concessions to Ceremonial Biblicalism, at http://constitution-first.org/the_oath.htm (last visited Mar. 24, 2004).

⁴⁰ See Larry Pahl, *On the Origins and Demise of the Free Exercise Clause of the First Amendment of the U.S. Constitution*, at <http://crisis.net/church-state/gone.htm> (last visited Mar. 24, 2004).

no means one-sided.⁴¹ These were debates over *state* policy and *state* constitutional law because, as you may recall, the first Supreme Court Establishment Clause cases *Everson v. Board of Education*⁴² and *McCullum v. Board of Education*⁴³ did not arise until the late 1940s.

Catholics, in those days, did not always fare so well. Even in Maryland, founded as a refuge for English Catholics and a place where Catholics and Protestants had long lived peaceably, the Glorious Revolution provided the stimulus by the early eighteenth century to transform the state into a less idyllic situation.⁴⁴ With an established Anglican Church, Catholics were double taxed.⁴⁵ They were excluded from office and forbidden from proselytizing or worshiping publicly.⁴⁶ As Judge McConnell notes, the right of Catholics such as John Carroll to participate in public debate was itself debated, even as the American Revolution approached.⁴⁷ Time does not permit detailing the history of Catholics in America, but given that history, we are accustomed to the Catholic contribution in public life being, at least sometimes, reluctantly received. Indeed, it has often required considerable courage to enter the arena of public life while still holding firm to one's Catholic faith.

Finally, let's look at today's twenty-first century environment and, in particular, at a little publicized, but very important, Doctrinal Note issued last November by the Congregation for the Doctrine of the Faith at the Vatican, addressed to all lay members of the faithful called to participate in the political life of democratic societies.⁴⁸ While lawyers are not necessarily politicians, and judges most certainly should *not* be, all of us are involved in the democratic enterprise, broadly speaking, as contemplated by this Vatican Note.

⁴¹ Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107 (2003).

⁴² 330 U.S. 1 (1947).

⁴³ 333 U.S. 203 (1948).

⁴⁴ See McConnell, *supra* note 41, at 2128.

⁴⁵ *Id.* at 2129.

⁴⁶ *Id.*

⁴⁷ *Id.* at 2128–29.

⁴⁸ Congregation for the Doctrine of the Faith, Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life (Nov. 24, 2002), at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html (Nov. 24, 2002) [hereinafter Congregation for the Doctrine of the Faith].

We are in a cauldron of change. Some of it is very good and represents progress toward more inclusive and peaceful relations amongst Americans and a greater recognition for the human rights that God vested in us to protect. Yet, in other respects, questions that once seemed settled have suddenly been opened, and our society's commitment to family, and to the most vulnerable and weakest among us, is in real doubt.

Surrounded by such undercurrents, what are we to make of the Holy See's guidance that Christians play their full role as citizens, that they lay faithful not relinquishing their participation in any sphere of public life and that they instead infuse the temporal order with Christian values? What should we make of its explicit praise of Thomas More for giving witness by his martyrdom to the inalienable dignity of the human conscience, never forsaking the constant fidelity to legitimate authority and institutions which distinguished him, emphasizing that he taught by his life and his death that man cannot be separated from God, nor politics from morality?

For all too many, the notion that politics should be separate from morals has become a mantra. To suggest otherwise, some say, would mean to impose values upon others. However, as Harvard Law Professor Mary Ann Glendon has so often observed, to offer ideas in a democracy is not to *impose* values; rather, it is simply to *propose* values for public discussion and deliberation.⁴⁹ The unfounded fear of imposing values upon others has often led to morally sterile public deliberations. Happily, there are occasional exceptions. Recall the debate that preceded the war in Iraq. That was certainly an issue on which people of faith could and did differ, yet it was just war doctrine, steeped in Catholic learning, which framed the public debate over the war in this country, in a way that was largely missing in continental Europe, where arguments arose primarily from concerns not of moral theory but merely of prudence and realpolitik. However, that willingness to speak publicly of how morals and values should shape public decisions has been lacking in many other spheres of human behavior. The Vatican Doctrinal Note offers the following explanation:

⁴⁹ See Mary Ann Glendon, *The Hour of the Laity*, in *FIRST THINGS* 23, 23–29 (2002).

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. Furthermore, it is not unusual to hear the opinion expressed in the public sphere that such ethical pluralism is the very condition for democracy. 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. At the same time, the value of tolerance is disingenuously invoked when a large number of citizens, Catholics among them, 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.⁵⁰

The mixture of politics and religion is a dangerous proposition, and one that we should view with skepticism, particularly as American Catholics. Indeed, the Second Vatican Council taught, in the great declaration *Dignitatis Humanae*, that religious liberty is the most fundamental of the human rights.⁵¹ But while religion and the state properly occupy autonomous spheres, a healthy and well-ordered public life requires a notion of the good that is grounded in moral theory.

As an attorney, or as a citizen in public life, one is tempted to wear separate hats and to divorce personal beliefs in one's work and public participation. My sense of the Church's message, at least as I read it, is that faith is unitive and integrated across all spheres of human activity. The same Vatican Note reminds us:

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

⁵⁰ Congregation for the Doctrine of the Faith, *supra* note 48.

⁵¹ See POPE PAUL VI, *Declaration on Religious Freedom on the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious*, in THE SIXTEEN DOCUMENTS OF VATICAN II AND THE INSTRUCTION ON THE LITURGY 394, 398-409 (1965).

which is Christ, bears its fruit in every sphere of existence and activity.⁵²

The thirteenth century example of St. Ives, who insisted that his causes be just, becomes especially poignant here, doesn't it?

Allied to the rigid ethical relativism that denies the legitimacy of proposing a conception of the good in public debate is the fierce secularism that would strip the public square of any mention of God. Here, we are not speaking of official establishment or of state churches. Rather, we deal simply with the public acknowledgment of God and of obligations that transcend fealty to the state.

Even Justice Brennan, a stalwart separationist, wrote that recognizing *some* official acknowledgment of God is appropriate "if [the] government is not to adopt a stilted indifference to the religious life of the people."⁵³ In a society with such a pervasive public sector, demanding absolute silence about God is really not neutral in any sense of the word. Rather, it conveys a powerful message and creates a distorted impression about the place of religion in our national life. The apparent preference for non-belief over belief was not the design of the Establishment Clause, yet that is the dilemma posed by the particular type of secularism and ethical relativism that surrounds us today.

In the midst of these currents, it is useful to retain our focus upon the vocation that God created us to pursue, and who better to look to than the witness of St. Thomas More, whose message was that professional duties cannot be divorced from faith. As the Vatican Note in our day explains, "[t]he right and duty . . . of all citizens to seek the truth with sincerity and to promote and defend, by legitimate means, moral truths concerning society, justice, freedom, respect for human life and other rights of the person, is something quite different" from improperly mixing religion and the state.⁵⁴ Our Catholic conception of the human person and the human good also represents not only a *legitimate* contribution to public life, but our *necessary* contribution to public life.

The way in which each of us bears such witness varies with our respective role in the profession. As the Note emphasizes,

⁵² Congregation for the Doctrine of the Faith, *supra* note 48.

⁵³ *Lynch v. Donnelly*, 465 U.S. 668, 714 (1984) (Brennan, J., dissenting).

⁵⁴ Congregation for the Doctrine of the Faith, *supra* note 48.

while everyone must be involved, there is a diversity and complementarity of forms, levels, tasks, and responsibilities. In short, we each have to contribute in our own way—according to our own abilities and our own place in the profession.

As I understand the Constitution, the tasks and responsibilities assigned to judges are different from those assigned to lawyers, or to legislators, or to others involved in our many democratic decision-making processes. As I understand its meaning, the Constitution rarely gives judges responsibility for making controversial moral decisions. In our constitutional scheme, judges' decisions are legitimate only insofar as they are *legal* decisions, free from moral subjectivity. In fact, at the federal appellate level, one of the judge's most important roles is assuring that the proper decision maker—not making the decision him or herself—makes important decisions.

To give one example, a panel of my court in 1996 found a *constitutional* right to assisted suicide.⁵⁵ Had *Compassion in Dying v. Washington* not been subsequently reversed, unanimously, by the United States Supreme Court,⁵⁶ the decision would have *judicially* carved out an exception to state prohibitions against assisted suicide throughout the Ninth Circuit. In my dissent from my court's refusal to reconsider the decision en banc, I recounted the very different experiences of the States of Oregon and Washington on the controversial, and value-laden, question of assisted suicide.⁵⁷ In Oregon, as many of you know, the electorate passed a ballot measure providing for a regime of legalized assisted suicide.⁵⁸ In Washington, by contrast, and in the other states where the circuit has jurisdiction, the courts initially imposed this policy upon the citizens.⁵⁹

As a judge, it would be improper for me to comment on the merits of the Oregon ballot measure, but at least the choice was made in the proper forum in democratic public deliberations, when citizens of every faith and of diverse views could propose

⁵⁵ See *Compassion in Dying v. Washington*, 79 F.3d 790, 816 (9th Cir. 1996).

⁵⁶ See *Washington v. Glucksberg*, 521 U.S. 702, 735–36 (1997), *overruled by* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁵⁷ See *Compassion in Dying v. Washington*, 85 F.3d 1440, 1442–43 (9th Cir. 1996) (O'Scannlain, J., dissenting).

⁵⁸ See *id.* at 1442 (O'Scannlain, J., dissenting).

⁵⁹ See *id.* at 1443 (O'Scannlain, J., dissenting).

their thoughts and moral values for consideration. A judge, by contrast, is not, as Judge Cardozo once warned:

[A] knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness.⁶⁰ As I wrote in my dissent:

The Supreme Court has never recognized a substantive due process right without first finding that there is a tradition of protecting that particular interest. Here, there is absolutely no tradition of protecting assisted suicide. Almost all states forbid assisted suicide and some states even permit the use of nondeadly force to thwart suicide attempts. No state has ever accepted consent of the victim as a defense to a charge of homicide. These are the political judgments made by the democratic process; if they are no longer "politically correct," let the legislatures act to change them, not life-tenured judges immune from voters' reach.

* * *

However much judges, as individuals, may desire such a right for the terminally ill, we, as judges, are limited by the text of the Constitution and by the Framers' clear intent that the judiciary be "disassociated from direct participation in the legislative process."⁶¹

Enough about judges though; because if the judge's role is tightly circumscribed, particularly in cases involving the most profound moral questions, the Catholic lawyer's role is *not*. The constitutional vision of the founders was not designed to cleanse the public square of participation by people of faith. Instead, it *depended* upon such participation. Much of that responsibility falls to those of you in this room.

And so I am so grateful that you are gathered here. Your presence tonight bears witness to the truth that sanctity is attainable, even for lawyers. Yes, it *is* possible to be a good Catholic and a good lawyer at the same time. Though the particular challenges of our time are new in some respects, as the Vatican Note highlights, the underlying tensions from which they arise probably are not so new after all. The Founders were open in their trust in God, and we should be as well. The paths

⁶⁰ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921).

⁶¹ *Compassion in Dying*, 85 F.3d at 1445-46 (O'Scannlain, J., dissenting) (quoting *Dennis v. United States*, 341 U.S. 494, 552 (1951) (Frankfurter, J., concurring)).

charted by Ives and More are ones to which we can aspire and have confidence in—Ives, the model of honesty, and More, the defender of truth. Being here, in this room full of energy and idealism and hope—hope ultimately founded on the promise of a risen Christ is cause for great joy.

I thank you, again, for the opportunity to share in it.

