

FAITH, PLURALISM, AND THE PRACTICE OF LAW

ROBERT K. VISCHER*

Religious lawyers grappling with the dictates of their faith in the context of their professional lives often seem to face an unenviable predicament: in effect facing a choice between amoral relativism and illiberal paternalism. To the extent that they subvert their own moral compasses to the professional paradigm embodied in the governing regulatory regime, they must artificially constrain the all-encompassing explanatory and prescriptive power of their faith traditions. But if they allow the tenets of their faith to dictate their provision of legal services, they threaten to turn the client-centered tradition of the profession upside-down.

Both the Model Rules of Professional Responsibility and the Model Code of Professional Conduct focus on the maximization of client autonomy, thereby presuming that the lawyer's own moral convictions are of limited relevance to the lawyer's work. For example, a religious lawyer working to structure a deal through which her corporate client plans to acquire a smaller company and terminate its low-level employees without any severance pay or reemployment assistance will most likely feel significant pressure to separate her own moral misgivings from her work in light of the Model Rules' suggestion that legal representation "does not constitute an endorsement of the client's political, economic, social or moral views or activities"¹ and the accompanying explanation that "lawyers usually defer to the client regarding such questions as . . . concern for third persons who might be adversely affected" by the representation.² Such an approach tends toward an ethical positivism, implicitly giving

* Assistant Professor, St. John's University School of Law. Thanks to Rick Garnett, Paul Kirgis, Michael Simons, and Susan Stabile for comments on earlier drafts of this essay.

¹ MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2003).

² *Id.* at cmt. 2.

sanction to any client-chosen means or ends that are not affirmatively proscribed by the profession, which in turn leads even the most well-intentioned lawyers of faith to adopt relativist stances on moral questions that arise in their representation of clients.

On the other hand, to the extent that religious lawyers subvert their conduct as a lawyer to their religious beliefs, they seem to sacrifice the core function that lawyers serve in a liberal democracy: pursuing others' conception of the good within the boundaries constructed by the law, not within the boundaries constructed by the individual lawyer's own religiously based conception of the good. It is neither practicable nor democratically desirable³ for a religious lawyer to ensure, for example, that her corporate client's policies and priorities comport fully with her faith tradition's teachings on social justice.⁴ Understandably reluctant to jettison the client-directed, gatekeeping quality of legal services, religious lawyers tend to limit, consciously or not, the impact of their faith, effectively segmenting their professional and personal identities.

This conundrum is by no means subject to tidy resolution, but it is prone to a more optimistic reframing in light of recent teaching from the Catholic Church that addresses the tension between the religious and political spheres. Specifically, the Church's Congregation for the Doctrine of the Faith ("CDF")⁵ has issued a Doctrinal Note laying out an explication of the moral obligations that accompany a lay Catholic's participation in the political processes of the secular state.⁶ Obviously, the analysis is most directly relevant to the life of a Catholic lawyer, but it

³ When a lawyer invokes her own vision of the good to foreclose her client from employing tactics or pursuing objectives that are legal, the argument goes, she has effectively usurped the function of the democratically accountable actors who established the legality of those tactics and objectives.

⁴ And more broadly, of course, if a client's behavior or objectives correlated perfectly with the standards espoused by religion, often there would be little need for legal representation in the first place.

⁵ In Pope John Paul II's words, the CDF's duty "is to promote and safeguard the doctrine on the faith and morals throughout the Catholic world." *Congregation for the Doctrine of the Faith*, at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_pro_14071997_en.html (last visited Mar. 23, 2004).

⁶ *Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life*, at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html (last visited Mar. 23, 2004) [hereinafter *Doctrinal Note*].

also holds value for any lawyer of faith concerned with the interplay—or lack thereof—between their professional and religious identities.

Lawyers share a fundamental trait with politicians: They both are charged under the liberal project with pursuing conceptions of the good that generally are formulated, expressed, and desired by others. As such, the CDF speaks directly to the predicament sketched above, and its key insight is centered in the espousal of what amounts to a limited value pluralism, which flows from its recognition of the fundamental distinction between the role of religious truth and moral truth in the decision-making of public actors—politicians and lawyers alike. A brief synopsis of the CDF's observations and conclusions bears out these lessons.

At the outset, the CDF unequivocally rejects the type of ethical relativism that, under the guise of serving client autonomy, often appears to hold sway in the legal profession. Observing the nature of liberal political discourse, the CDF notes that:

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.⁷

This relativism cuts an even broader swath because:

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.⁸

Nevertheless, Catholics and other like-minded citizens must contest the “falsehood of relativism, and with it, the notion that there is no moral law rooted in the nature of the human person.”⁹

Discerning the content of this moral law must begin by recognizing that it is not a freestanding or random collection of prohibitions, but a comprehensive worldview that emanates from

⁷ *Id.* ¶ 2.

⁸ *Id.*

⁹ *Id.*

“a correct understanding of the human *person*.”¹⁰ Catholics acting in the political sphere cannot compromise their understanding of the person, “for otherwise the witness of the Christian faith in the world, as well as the unity and interior coherence of the faithful, would be non-existent.”¹¹ As such, Catholic lawyers, even when entering into the secular sphere of law, are bound by certain “fundamental and inalienable ethical demands,”¹² including demands to “defend the basic right to life from conception to natural death;” to safeguard and promote the family “in the face of modern laws on divorce;” to ensure “the freedom of parents regarding the education of their children;” to protect minors and combat “modern forms of slavery” such as “drug abuse and prostitution;” to fight for “religious freedom and the development of an economy that is at the service of the human person and of the common good;” to help implement the principles of solidarity and subsidiarity; and to pursue peace, which “demands the absolute and radical rejection of violence and terrorism.”¹³

Certainly the import of these demands will not always be clear-cut in particular real-world scenarios, and many contrasting subordinate values are within the orbit of a dignity-based ethic. The CDF acknowledges as much, noting, “a plurality of methodologies reflective of different sensibilities and cultures can be legitimate in approaching such questions.”¹⁴ The significant limitation is that “no Catholic can appeal to the principle of pluralism or to the autonomy of lay involvement in political life to support policies affecting the common good which compromise or undermine” such demands.¹⁵ In other words, the Catholic lawyer cannot avoid her responsibility to meet these demands simply by invoking a mantle of autonomy whenever she steps into the professional sphere.

This rejection of ethical relativism facilitates the personal integrity of the ethical actor. The CDF’s analysis consequently precludes the acceptability of the segmented life, emphasizing that an individual cognizant of absolute truth must integrate

¹⁰ *Id.* ¶ 3 (emphasis in original).

¹¹ *Id.*

¹² *Id.* ¶ 4 (emphasis in original).

¹³ *Id.* (emphasis in original).

¹⁴ *Id.* ¶ 5.

¹⁵ *Id.*

that truth in a manner that brings coherence, not dissonance, to every aspect of their existence:

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.'"¹⁶

Acknowledging the moral law's ethical demands is a prerequisite not only for the Christian lawyer's personal integrity but also for her role in the evangelical impetus that in large part defines the faith. The CDF reminds Catholics that "[t]he presentation of the fruits of the spiritual, intellectual and moral heritage of Catholicism in terms understandable to modern culture is a task of great urgency today."¹⁷ Through its teaching, the CDF intends "to instruct and illuminate the consciences of the faithful, particularly those involved in political life, so that their actions may always serve the integral promotion of the human person and the common good."¹⁸

Crucially, in the CDF's view, the non-negotiability of these ethical demands does not represent the illegitimate intrusion of religious dogma into the secular domain. Emphasizing that "such ethical precepts are rooted in human nature itself and belong to the natural moral law," the CDF explains that "[t]hey do not require from those who defend them the profession of the

¹⁶ *Id.* ¶ 4 (quoting *Apostolicam actuositatem*, 4).

¹⁷ *Id.* ¶ 7.

¹⁸ *Id.* ¶ 6.

Christian faith.”¹⁹ This is a necessary characteristic given “the rightful autonomy of the political or civil sphere from that of religion and the Church? but not from that of morality.”²⁰ The need to safeguard religious liberty and other individual rights leads the CDF to emphasize the proper boundaries between the spheres: “The recognition of civil and political rights, as well as the allocation of public services may not be made dependent upon citizens’ religious convictions or activities.”²¹ The moral precepts binding on the Catholic lawyer in all aspects of her identity are not coextensive with the tenets of her faith, and she need not feel compelled to mirror every nuance of her own religious beliefs in the means or ends chosen by her client.

Even in practice areas impacted by the content of the moral law, the CDF recognizes a variety of ways in which the Catholic lawyer’s ethical obligations can be acknowledged. The dignity of the human person cannot be disregarded, notwithstanding the wishes of the client or the import of the client’s cause; however, there are many paths by which that dignity may be upheld. The CDF is careful to distinguish relativism from “the legitimate freedom of Catholic citizens to choose among the various political opinions that are compatible with faith and the natural moral law, and to select, according to their own criteria, what best corresponds to the needs of the common good.”²² While not every conception of the good is equally valid and true, “a plurality of morally acceptable policies and solutions arises” from the fact that “politics are concerned with very concrete realizations of the true human and social good in given historical, geographic, economic, technological and cultural contexts.”²³ As a result, “[i]t is not the Church’s task to set forth specific political solutions? and even less to propose a single solution as the acceptable one? to temporal questions that God has left to the free and responsible judgment of each person.”²⁴

In this sense, the CDF espouses a distinctly pluralist approach to the integration of faith and legal practice. There is no pluralism “in the choice of moral principles or essential

¹⁹ *Id.* ¶ 5.

²⁰ *Id.* ¶ 6.

²¹ *Id.*

²² *Id.* ¶ 3.

²³ *Id.*

²⁴ *Id.*

values,” but there is a “legitimate plurality of temporal options” given the “variety of strategies available for accomplishing or guaranteeing the same fundamental value, the possibility of different interpretations of the basic principles of political theory, and the technical complexity of many political problems.”²⁵ There is also, of course, a plurality of religious values in the political sphere, a plurality safeguarded by the inalienable moral right to religious liberty and freedom of conscience. This aspect of pluralism does not slide into relativism because it “is based on the ontological dignity of the human person and not on a non-existent equality among religions or cultural systems of human creation.”²⁶

With these observations, the CDF, consistent with longstanding Catholic teaching, has carved out an alternative to the alienating extremes of the morally segmented life and the agency-squelching dictates of a one-size-fits-all approach to ethical decision-making. For the Catholic lawyer, this makes the practice of law possible. The Catholic lawyer does not have to pretend that her deeply held beliefs speak only to the non-professional aspects of her existence. In terms that Camus used to explain the feeling of absurdity, such segmentation constitutes a “divorce between man and his life, the actor and his setting,” creating an existence in which “man feels an alien, a stranger.”²⁷

At the same time, the vision illuminated by the CDF 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,²⁸ 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

²⁵ *Id.*

²⁶ *Id.* ¶ 8.

²⁷ ALBERT CAMUS, *An Absurd Reasoning*, in *THE MYTH OF SISYPHUS AND OTHER ESSAYS* 5 (1995).

²⁸ This contention is not to deny the lawyer’s proper role in helping shape the client’s objectives through constructive, often value-laden dialogue. See Robert K. Vischer, *Catholic Social Thought and the Ethical Formation of Lawyers: A Call for Community*, 1 *VILL. J. CATH. SOC. THOUGHT* __ (forthcoming 2004).

conduct that clashes with the moral law's conception of the human person.

While this fundamental moral conception of the human person that is to be furthered by every Catholic's vocation remains fixed and unchanging, there is a vast universe of subordinate and widely varying values that constitute the daily effort to fulfill that vocation. For lawyers especially, the values to be served in their professional capacities will not always correlate perfectly with the values they seek to serve in their personal capacities. Both sets of values must, however, be consistent with the recognized dignity of the human person.

A few examples bear out the potential scope of this core consistency. A Catholic lawyer asked to defend an accused murderer against overwhelming evidence of guilt may very well decide to take on the representation in service to the notions of human dignity embodied in the individual procedural protections offered by our criminal justice system. But such systemic considerations only go so far, and cannot, under the CDF's framework, justify the facilitation of acts that defy the core conception of the person. In this regard, if the accused murderer confided in the lawyer an intention to commit more murders upon acquittal, the lawyer would be hard-pressed to justify continuing the representation. Similarly, a Catholic lawyer asked to represent a minor seeking court permission to obtain an abortion without her parents' consent must refuse the representation.²⁹ This outright prohibition against facilitating defiance of the moral law also undoubtedly underlies a recent statement by the Pope in which he seems to question the moral standing of Catholic divorce lawyers.³⁰

²⁹ See Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 96-F-140 (1996) (requiring Catholic lawyer to proceed with a court appointment in such a case despite his religiously grounded objection); see also Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 640-48 (1997) (analyzing Tennessee Formal Opinion 96-F-140 and exploring alternatives for attorneys to avoid court appointments based on their beliefs).

³⁰ The Pontiff cautioned that Catholic lawyers "must always decline the use of their profession for an end that is counter to justice, like divorce." David O'Reilly, *Pope's Words Unsettle Catholic Lawyers*, PHIL. INQUIRER, Feb. 3, 2002, at B05 (reporting on pope's statement to the Roman Rota); Melinda Henneberger, *John Paul Says Catholic Bar Must Refuse Divorce Cases*, N.Y. TIMES, Jan. 29, 2002, at A4 ("Pope John Paul II said . . . that civil lawyers who are Roman Catholic must refuse to take divorce cases . . ."); Cindy Wockner & Amelia Kerr, *Pope acts to stem*

But the limited pluralism espoused by the CDF is not simply a template for determining the permissibility of a proposed representation. Rather, the CDF has offered a spirited defense of the notion that the Church's conception of the person can be honored in divergent ways, and that there are often multiple layers of moral truth implicated by a given set of events. For lawyers especially, the recognition of this complexity is essential, but it cannot justify the abdication of moral responsibility. For example, agreeing to facilitate a landlord's eviction of low-income tenants seems problematic given the Church's teaching regarding the poor. At the same time, though, the Church certainly contemplates a societal role for the economic dictates of capitalism, as well as the defense of the landlord's property rights. The seemingly inescapable tension between these strands of Catholic social thought is rendered more manageable by the CDF's insight. Focusing on the overarching dignity of the person, rather than the dominance of one particular value or the other, allows the Catholic lawyer to maintain some semblance of professional and personal coherence. A lawyer with such a mindset may decide to proceed with filing eviction papers, but perhaps only after devoting (likely unbilled) time seeking alternative avenues by which the tenants' housing needs could be met.

As for the transactional lawyer mentioned at the outset of this essay, if her corporate client proposed a deal that required the termination of workers and took no account of the personal hardship caused thereby, the lawyer may be obliged to raise her concerns with the client and at least ensure that the acquisition proceeds along one of the many paths consistent with the dignity of the workers. Under these circumstances, a Catholic lawyer's recognition of the moral law would not preclude economically necessary layoffs, but would simply require that the plight of the affected workers be considered and aided to the extent feasible. If the client persisted on a path that did not take account of the workers' well being, then withdrawal from the representation may be in order.³¹

'plague' - Catholic lawyers asked to stop handling divorce cases, THE DAILY TELEGRAPH, Jan. 30, 2002, at 9 ("Pope John Paul II has created a storm of controversy around the globe, calling on Roman Catholic lawyers and judicial officers to avoid working on divorce cases.")

³¹ See MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2002) (allowing an

Of course, the moral law will also speak to the more mundane methods of everyday legal practice, precluding, for example, lying to the court or facilitating lying by her client, taking unfair advantage of an adversary, or turning a blind eye to suffering caused by the representation, even if extrinsic to the attorney-client relationship.

The point of these examples is not to establish a checklist of permissible and impermissible conduct, but simply to show that Catholic teaching aims to shape a lawyer's conduct, not to dictate it. Indeed, the vast majority of decisions to undertake a given representation and how to proceed within a given representation will not directly implicate the moral law. Even where the points of impact are clear, the implications of that impact will not always be clear, and conscientious Catholic lawyers will disagree about what their moral obligations compel them to do under particular circumstances. Such disagreement does not somehow render the ethical inquiry superfluous, but underscores the need for deliberate, and often communal,³² distillation of Catholic teaching and discernment of its professional applications.

The integration of faith and legal practice presents neither an esoteric pipe dream nor an unending fount of debilitating guilt. It arises from a core of moral truth that is capable of ongoing implementation through the day-to-day decisions of the lawyer. But it is not without cost. A heightened sensitivity to the import of faith for the practice of law cannot be translated purely into a sense of empowerment or entitlement on the part of individual religious lawyers or their communities of faith. More than most vocations, the practice of law tends to wed lawyers to conceptions of the good that are not their own. An individual choosing a life of faith together with a life in the law will continue to experience significant tension in the development and maintenance of her own identity, sense of loyalty, and notions of professional duty. When a lawyer takes her faith seriously, there often will be serious professional consequences. In certain instances, a lawyer will have to make tough, costly decisions between the dictates of the moral law, as elucidated by

attorney to withdraw from representing a client who "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement . . .").

³² See Vischer, *supra* note 28, *passim* (discussing communal nature of faith-based ethical discernment in the context of Catholic lawyering).

her faith tradition, and the demands of a client-centered business.

But the dictates of the moral law need not be construed as an insurmountable obstacle to a person of faith functioning ably and faithfully as a provider of legal services within a liberal democracy. Indeed, the CDF's message should encourage lawyers of every faith to persist along the many potential paths of integration between the moral law and legal practice. Christians, in particular, are called to the legal profession, just as they are called more broadly to "exercise their proper task of infusing the temporal order with Christian values, all the while respecting the nature and rightful autonomy of that order."³³ The CDF emphasized that "the lay faithful are never to relinquish their participation in 'public life', that is, in the many different economic, social, legislative, administrative and cultural areas, which are intended to promote organically and institutionally the common good."³⁴ Discerning and following the paths of integration may not always be obvious, nor cost-free, but it is an essential undertaking for any lawyer seeking "the unity of Christian life: coherence between faith and life, Gospel and culture."³⁵

³³ *Doctrinal Note supra* note 6, ¶ 1.

³⁴ *Id.* (quoting John Paul II, Apostolic Exhortation, *Christifideles locici*, 42).

³⁵ *Id.* ¶ 9.

