

CATHOLICS AND THE DEATH PENALTY PANEL DISCUSSION

PANELISTS:

KEVIN M. DOYLE, ESQ., NEW YORK CAPITAL DEFENDER
CHARLES J. HYNES, ESQ., KINGS COUNTY DISTRICT ATTORNEY

MODERATOR:

ART C. CODY, ESQ., OSTROLENK, FABER, GERB & SOFFEN, LLP

Ms. Uelmen: This conversation is the first in a three-part series in which we set out to explore the topic “Catholics and the Death Penalty.” It focuses on some of the key players in our criminal justice system: lawyers, jurors, and in the spring we’ll talk about judges. Before I turn the mike over to Art, who will moderate, just a word about our hoped-for approach for tonight’s conversation. It seems that one of the strongest arguments for keeping religious perspectives out of politics and also out of the practice of law is that they tend to create insurmountable division and misunderstanding. Often when I’m in the midst of these debates, I find myself thinking, “But you should see how we fight about these issues within the same religious community.”

I think we can all agree that tonight’s topic is one where people within the Catholic community have strongly held views which stretch across the political spectrum. But our aim for this evening is not to have a debate. Our aim is to explore how lawyers who take the Church’s teaching seriously have worked through the scope of its application in their work as lawyers in the criminal justice system. My dream, I have to confide, is that our efforts to talk through our passionately held positions with genuine respect, with the capacity to listen and truly appreciate why the other may

differ, that this may even become a hopeful model for overcoming the polarizing and paralyzing tensions that plague not only the Church but much of the broader political discourse.

With that, I turn the mike over to Art Cody. He's an attorney at Willkie Farr & Gallagher LLP [now with Ostrolenk, Faber, Gerb & Soffen, LLP] and the Chairman of the Religion and Death Penalty Subcommittee of the Association of the Bar of the City of New York. He has been active in the post-conviction representation of condemned inmates in Texas and Alabama for over ten years. He is presently defending an inmate on Alabama's death row. Art will introduce our distinguished speakers and guide us through our conversation tonight. Thank you again for coming.

Mr. Cody: Good evening. As Amy stated, my name is Art Cody and I'll be your moderator for this evening. Tonight we are very fortunate to have with us two prominent Catholic lawyers who are involved in death penalty litigation on a weekly, if not daily, basis. We will have the opportunity to hear the very differing perspectives that these two Catholic attorneys come at this issue.

To my far left, and sitting position has no connotation on political persuasion, is Kevin M. Doyle, the head of the Capital Defenders Office of the State of New York. This is the organization to which the State has given the statutory mandate of ensuring that defendants who cannot afford adequate representation in capital cases receive effective representation. To his right, Charles J. Hynes, the Kings County District Attorney, who has the discretionary power to seek the death penalty in Brooklyn cases where he feels it is appropriate. Let me provide some brief biographical data on each.

Kevin Doyle is a 1978 graduate of Fordham University and a 1982 graduate of the University of Virginia Law School. Upon graduation from law school, he joined the New York Legal Aid Society's

Criminal Defense Division. He later worked with the Federal Defenders Unit until becoming an associate at a Wall Street law firm in 1988. Two years later, in 1990, he joined the Capital Defense Representation Resource Center in Alabama. While in Alabama, Mr. Doyle successfully represented capital defendants at every stage: trial, appellate, and in post-conviction proceedings. With the reinstatement of the death penalty in New York,¹ he was appointed the head of the Capital Defenders Office in 1995, a position he has held since that date. He is a frequent contributor to leading Catholic periodicals regarding Catholicism and the death penalty. Please welcome Kevin Doyle.

District Attorney Charles J. Hynes was elected the twenty-seventh District Attorney of Kings County in 1989. He is a graduate of St. John's University and St. John's University School of Law. After graduation from law school, he served as an associate for Legal Aid for several years prior to joining the Kings County District Attorney's Office in 1969. He has served Kings County, the City of New York, and the State of New York in a variety of distinguished ways, including Chief of the Racket Bureau of Kings County, First Deputy District Attorney of Kings County, Fire Commissioner for the City of New York, Special State Prosecutor for Nursing Home Fraud, Special State Prosecutor for the New York City Criminal Justice Division, and, starting in 1989, as the District Attorney of Kings County. He is a professor of law at, among other places, Fordham University School of Law. Please welcome Charles Hynes.

Prior to getting to the perspectives that Mr. Doyle and Mr. Hynes bring to the capital punishment issue, I would like to briefly describe

¹ James Dao, *Death Penalty in New York Reinstated After 18 Years*, N.Y. TIMES, Mar. 8, 1995, at A1 (discussing the signing of the new death penalty bill into law); Beth Holland, *Death Penalty Era Begins*, NEWSDAY (N.Y.), Aug. 31, 1995, at A4 (discussing the new law's taking effect on September 1, 1995).

how this evening will run. First and foremost, as Amy mentioned, tonight is not a debate on the merits of the death penalty, rather it is a discussion of how these two Catholic attorneys came to their positions on the death penalty and how their faith informs and influences their practice in the capital litigation arena. Appreciating the different perspectives that each brings, I have prepared and provided a different discussion question for each of them.

The sequence of tonight's discussion will be as follows: First, District Attorney Hynes will start off with a twenty-minute presentation in which he'll respond to the discussion question that I have provided. I will read that discussion question for you. Mr. Doyle will then have thirty minutes to respond to both the discussion question provided to him by myself as well as provide his perspective on Mr. Hynes' remarks. Lastly, Mr. Hynes will then have an additional ten minutes to respond to Mr. Doyle's perspective. I may then ask a few follow-up questions and then open it up to the floor for additional questions.

Regarding questions, please keep your questions short and on the topic of tonight's discussion, "Catholic Lawyers and the Death Penalty." The lone exception to the short-question rule is of course the discussion questions, which I wrote. The idea was that these discussion questions were designed to both provide a framework for the individual panelists, yet still allow them considerable freedom with their remarks.

With that, I'll start with the first discussion question for District Attorney Hynes. Over the past ten years, the Catholic Church has clarified the occasions in which the death penalty is permissible, condoning execution "if this is the only possible way [to] effectively defend[] human lives

against the unjust aggressor.”² The Church, however, has pointed out that such circumstances “in which the execution of the offender is an absolute necessity ‘are very rare, if not practically non-existent.’”³ Pope John Paul II, particularly, emphasized that the United States does not fall under the rubric of this necessity exception, challenging Americans to end the death penalty, “which is both cruel and unnecessary.”⁴ The United States Catholic Conference has also echoed those views in its Good Friday 1999 appeal to end the death penalty; opposing state laws that would permit the death penalty and calling for “the abolition of the death penalty.”⁵

This nation’s highest court, however, has consistently affirmed the constitutional nature of the death penalty, regardless of necessity.⁶ Likewise, the New York State Court of Appeals, while recently finding a provision of New York’s death penalty law unconstitutional,⁷ has never

² CATECHISM OF THE CATHOLIC CHURCH ¶ 2267 (2d ed. 1997).

³ *Id.* (quoting JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶ 56 (1995)).

⁴ UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, A GOOD FRIDAY APPEAL TO END THE DEATH PENALTY (1999) [hereinafter *A GOOD FRIDAY APPEAL*], available at <http://www.nccbuscc.org/sdwp/national/criminal/appeal.htm> (quoting Pope John Paul II, Mass in St. Louis, Mo. (Jan. 27, 1999)).

⁵ *Id.*

⁶ See Stephen Kanter, *Confronting Capital Punishment: A Fresh Perspective on the Constitutionality of the Death Penalty Statutes in Oregon*, 36 WILLAMETTE L. REV. 313, 351 (2000) (noting that the dissent in *Furman v. Georgia*, which ultimately became the Supreme Court’s majority position on the per se constitutionality of capital punishment, concluded that the Eighth Amendment does not require the courts to consider the “necessity” of capital punishment); see also Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 880 & n.373 (1990) (noting the Supreme Court’s refusal to apply the necessity standard in decisions concerning the Eighth Amendment right to be free from cruel and unusual punishment); Lawrence A. Darby III, Note, *Furman v. Georgia*, 408 U.S. 238 (1972), 47 TUL. L. REV. 1167, 1177 (1973) (discussing Chief Justice Burger’s proposition in his dissenting opinion in *Furman v. Georgia* that penalties which are unnecessary to achieve penological goals are not in themselves violative of the Eighth Amendment).

⁷ *People v. LaValle*, 3 N.Y.3d 88, 128–31, 817 N.E.2d 341, 365–67, 783 N.Y.S.2d 485, 509–11 (2004) (holding that a statutorily mandated deadlock instruction—requiring the court to instruct the jury in capital sentencing that failure by the jury to reach a unanimous verdict on either a death sentence or life without parole would

found capital punishment to be per se cruel and unusual.⁸ In light of the recent New York State Court of Appeals ruling, numerous state representatives have called for immediate legislative measures to return capital punishment to New York. As Senate Majority Joseph Bruno stated, “We will fix whatever we have to fix.”⁹ Governor Pataki has joined this call for reinstatement and had frequently called for expansion of the now-invalidated death penalty statute.¹⁰

result in a life sentence with eligibility for parole after twenty to twenty-five years—created an impermissible risk of arbitrary sentencing based on speculation, and therefore violated the New York State Constitution’s due process clause).

⁸ See, e.g., *People v. Smith*, 63 N.Y.2d 41, 78, 468 N.E.2d 879, 898, 479 N.Y.S.2d 706, 725 (1984) (invalidating the imposition of the mandatory death sentence due to its failure to provide for the consideration of individual circumstances); *People v. Davis*, 43 N.Y.2d 17, 36–37, 371 N.E.2d 456, 466, 400 N.Y.S.2d 735, 746 (1977) (holding the death penalty statute unconstitutional due to the lack of a provision for the “consideration of relevant and particularized mitigating factors”); *People v. Fitzpatrick*, 32 N.Y.2d 499, 512–13, 300 N.E.2d 139, 145–46, 346 N.Y.S.2d 793, 802 (1973) (overturning the death penalty statute as unconstitutional because it left the imposition of the death penalty solely to the discretion of the jury); see also Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant’s Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 92 n.119 (2002). See generally Michael Lumer & Nancy Tenney, *The Death Penalty in New York: An Historical Perspective*, 4 J.L. & POLY 81, 83–97 (1995) (describing the statutory evolution and jurisprudential history of New York’s death penalty).

⁹ Joel Stashenko, *Lawmakers Vow to Fix Death Penalty*, TIMES UNION (Albany), July 12, 2004, at B3.

¹⁰ Governor Pataki recently called for a reinstatement of the death penalty in his State of the State address. Errol A. Cockfield Jr., *Pataki Focuses on His Legacy*, NEWSDAY (N.Y.), Jan. 6, 2005, at A16. Prior to the death penalty being overturned, he sought its expansion on at least three occasions. First, in his 1998 State of the State address, Governor Pataki proposed to “expand[] . . . the death penalty law to allow juries to hear impact statements by victims’ families and to expose a convict’s complete criminal history during the trial’s sentencing phase.” Editorial, *Pataki’s Dollars and Sense*, DAILY NEWS (N.Y.), Jan. 8, 1998, at 38; see also Editorial, *Dueling Campaign Speeches*, N.Y. TIMES, Jan. 8, 1998, at A26. Second, in 1999, Governor Pataki sought to “expand the types of intentional murders for which the death penalty could be imposed.” James M. Odat, *Abortion Access Bill Approved*, TIMES UNION (Albany), June 18, 1999, at A1 (explaining that the death penalty provision was attached to an abortion-clinic access measure). Third, in the wake of the terrorism attacks on the World Trade Center in New York in 2001, Governor Pataki sponsored legislation that “broaden[ed] the [S]tate’s death penalty law to specifically include acts of terrorism.” Tom Precious, *State Lawmakers Quickly Pass Anti-Terrorism Laws in Wake of Attacks*, BUFFALO NEWS (N.Y.), Sept. 18, 2001, at A8; see also Elizabeth Benjamin, *Out of the Heart of Darkness: Following the Attacks*

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Now the discussion questions—A district attorney is sworn to uphold and enforce the law and is answerable to higher governmental leaders to do just that. Question one: have the reflections of the Catholic Church on the death penalty influenced your approach to enforcing the death penalty? If so, how? The second part of the question: do you perceive any conflict or tension between your Catholicism and your role as a prosecutor who has the discretion, and in fact can be compelled, to seek the death penalty? If so, how do you navigate your way through this conflict?

Mr. Hynes: Thank you. Well, listening to Amy and her allusion to treading on the dangerous waters of politics and other controversial subjects, it reminds me of my Aunt Minnie, who refused to allow discussions of politics or religion at her dining room table in Dorchester, Massachusetts. She would be happy tonight with me. I'm not sure everybody else is going to be so happy because the answer to the first question is I'm not at all influenced by the Church's position. I'm not sure that it is as clear as it ought to be. It has certainly never spoken *ex cathedra* on the issue. So it has not influenced my position on supporting the death penalty where I have to. I don't have to answer to any other higher authority than the people of Kings County, and as long as 51% retain me, I'll be there until I die or they throw me out.

The second part of the question is, while I have discretion I have to apply the discretion orderly. I cannot be compelled, as the question indicates. No one can compel me to seek the death penalty. I can be removed, but it's not forcing me to impose the death penalty or seek the death penalty. We've had but one district attorney removed since the restoration. That was Bob

on the World Trade Center, the New York Legislature Lost No Time Passing Disaster Aid and Anti-Terrorism Bills, ST. LEGISLATURES, Dec. 1, 2001, at 13; John Caher, *State Legislature Approves Tough Anti-Terrorism Laws*, N.Y. L.J., Sept. 18, 2001, at 1.

Johnson in The Bronx.¹¹ I was President of the State D.A.'s Association. I urged the Governor not to do it. I told him that I believed that Johnson's position that he would keep the door open was an honest one and his being removed was wrong. It turns out that the judicial review was on the side of Governor Pataki.¹²

My documented public opposition to the death penalty goes back for more than a quarter of a century. I first spoke to the issue in 1978, when I unsuccessfully sought the nomination for the Democratic Party for State Attorney General. At the party's convention in Albany, only two candidates were endorsed: Robert Abrams of Manhattan, who was later elected Attorney General, and Justice Dolores Denman of Buffalo. Neither I nor Nicholas Scoppetta, who is currently the New York City Fire Commissioner, received sufficient votes of the convention delegates to qualify for the primary.

Throughout my pre-convention campaign, I repeatedly stated my opposition to the death penalty, as did Robert Abrams. After Judge Denman was co-nominated at the last minute by party leaders who were trying to deprive Bob Abrams of a primary victory, I met with Judge Denman at her request. Since she had considerably more experience as a lawyer than Bob Abrams, I was inclined to support her, but I had one question: what was her position on the death penalty? As a last-minute candidate, she had not stated any views on that subject, amongst other

¹¹ See Jonathan DeMay, Note, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767, 767-69, 768 n.9, 769 n.10 (1999); see also *Johnson v. Pataki*, 91 N.Y.2d 214, 223-24, 691 N.E.2d 1002, 1005-06, 668 N.Y.S.2d 978, 981-82 (1997) (holding that the Governor had discretionary authority to supersede the district attorney in a particular matter, and that the Governor's use of discretion in this instance was valid).

¹² *Johnson*, 91 N.Y.2d at 220, 691 N.E.2d at 1003, 668 N.Y.S.2d at 979 (1997) ("We hold that the Governor acted lawfully under constitutional and statutory authority, and that even if the rationale for his action were subject to judicial review the superseder order here would be valid."); see also DeMay, *supra* note 11, at 768-69 (discussing the circumstances surrounding *Johnson v. Pataki*).

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subjects. When she told me she was a strong supporter of legislation to restore the death penalty, I told her I could not support her.

She asked me if my position was grounded in my Catholicism. Before I could answer, she said that she was also a Catholic, and did I know that the Catholic Church was not, at the time, a strong opponent of the death penalty? I replied that I didn't know that, nor did it in any way influence my decision. It did not then; it does not now, however evolving the Catholic position seems to be. I told Justice Denman what I'll tell you this evening: my opposition to the State's policy of life termination in murder cases is not theological; it's pragmatic.

By the time I met with Judge Denman in 1978, for fifteen years I had practiced on both sides of the well—as a defense lawyer and as a prosecutor. That experience told me the following: the death penalty is not a deterrent to those who would consider taking the life of another, which was the prevailing myth in the 1970s. Moreover, I concluded that the death penalty is not an appropriate expression of society's outrage, which is another flawed position of those who would restore the death penalty. My position then, as it is today, is that life imprisonment without the possibility of parole is a much more punishing expression of society's outrage.

Another objection was, and is, that the risk of executing the innocent is a fact that has produced a shocking history of injustice in many parts of this country. In addition, it most often has affected economically deprived members of our society, and frequently those who are victims of discrimination.¹³ And finally, the resources needed for the State to execute can run into the millions of

¹³ See IRA J. SILVERMAN & MANUEL VEGA, *CORRECTIONS: A COMPREHENSIVE VIEW* 31–33 (1996) (noting that race and economics have an influence on the likelihood of a defendant being charged with capital murder or receiving the death penalty).

dollars for just one death penalty case and take as many as fifteen to twenty years before the sentence is carried out which, incidentally, is another reason why the penalty does not deter.¹⁴ By contrast, life imprisonment without the possibility of parole, given the life expectancy rates in prison, requires significantly less resources.¹⁵

This evening, with more than four decades of experience as a criminal lawyer, nothing about these objections I hold has changed. What has changed is the law, and the law changed because the public was deceived. They were told by the man challenging Mario Cuomo in 1994 that the reimposition of the death penalty would reduce murder rates in New York State and would even reduce violent crime.¹⁶ But the facts were that by 1994, during that state-wide race, murder rates and other violent crime rates had plummeted.¹⁷ Nonetheless, it was the often-repeated theme of George Pataki—another Catholic and in other respects a decent and sincere public official, I suppose.

What troubled me during that race for governor in 1994 is that everyone in this state who had any interest or cared about the death penalty knew very well that if Mario Cuomo was defeated by George Pataki, one of the first acts that Pataki would make was to restore the death penalty. As a matter of fact, as far back as—and by the way,

¹⁴ See generally Richard C. Dieter, Executive Dir., Death Penalty Info. Ctr., Costs of the Death Penalty and Related Issues, Address Before the New York State Assembly Standing Committees on Codes, Judiciary, and Correction (Jan. 25, 2005) (transcript available at <http://www.deathpenaltyinfo.org/NY-RCD-Test.pdf>) (discussing the economic and societal costs of the death penalty).

¹⁵ See SILVERMAN & VEGA, *supra* note 13, at 34 (explaining that it costs much more “on average, to try, convict, and execute a murderer when compared with the cost of a life prison term”).

¹⁶ See *The 1994 Campaign; Pataki on the Record: Excerpts From a Talk on Campaign Issues*, N.Y. TIMES, Oct. 10, 1994, at B4 (publishing excerpts from a press conference where Pataki explained why he believed the imposition of death penalty would be a deterrent to future crime).

¹⁷ See Disaster Ctr., New York Crime Rates 1960–2000, <http://www.disastercenter.com/crime/nycrime.htm> (last visited Oct. 21, 2005) (showing a decrease in New York’s crime rate in 1994 from prior years).

what I couldn't understand was that voices heard today all over the state were strangely silent as far back as 1998—there was no one asking for a repeal of the death penalty, there was no consensus to repeal the death penalty, and so it was left for the New York State Court of Appeals to judicially repeal the law, as it did recently.¹⁸ The obvious question for me to address is: given the opposition I have to the death penalty, why have I sought the penalty eleven times of the ninety-five cases which were statutorily eligible for execution by lethal injection? Quite simply, that decision is based solely on what I believe is my obligation under this State's constitution to follow the law passed by the legislature and enacted by the governor's signature.

In order to eliminate any possibility of mistake in seeking the death penalty, I created a panel of experienced trial lawyers. The panel is not only multiracial, it is multi-gendered, and has an average of fifteen years' trial experience. All potential capital murder cases are assigned at the discovery of a body to a senior deputy and a senior trial assistant in the Homicide Division.

When a defendant has been apprehended, a comprehensive investigation is then conducted by a team working with homicide detectives. The team makes a recommendation to the chief of the Homicide Division recommending a sentence of life without parole or death. The homicide chief will either pass on that recommendation to the panel or notify the panel with reasons why it rejects it. The panel will often question members of the team about the details of the investigation and will review mitigation offered by the defense. Within 125 days from the arraignment on the indictment for murder in the first degree the panel must make

¹⁸ *People v. LaValle*, 3 N.Y.3d 88, 128–31, 817 N.E.2d 341, 365–67, 783 N.Y.S.2d 485, 509–11 (2004) (holding that the State's jury instructions were unconstitutional under the state constitution and that the constitutional defect in the existing statute could only be cured by passage of a new law by the legislature).

its recommendation to me, and I have an obligation to notify the court and the defendant at that time.

What I'll share with you this evening is something I have never publicly revealed, and that is the reason why I have chosen these eleven defendants for the death penalty. In every single case it involved a vile example of murders not merely containing the requisite degree of premeditation—which existed in the other eighty-four death-eligible cases—but murders which did not consider for a moment the mercy asked and pleaded for by the victims; murders which, according to my minimal research, fit the Holy Father's 1995 Encyclical, *The Gospel of Life*, which I'll paraphrase: the execution of offenders as an absolute necessity must be very rare.¹⁹ Note: not abolition, rare.²⁰ I'll close with the facts of three of these cases, but I assure you that the other eight amply fit this rare exception.

The case of Michael Shane Hale: The defendant decided to kill his lover after being thrown out of the apartment that was owned by the lover. Hale waited in the garage for his lover to enter his automobile. Hale, using a judo move, slammed the victim to the concrete floor and then with a wooden plank repeatedly hit him over the head until he thought he was dead. He then put the victim in the trunk and drove aimlessly for awhile. He was startled when he heard the moaning from the trunk. When he approached the trunk, he heard the victim cry out, "Michael, please help me." Hale threw open the trunk, put a plastic bag over the victim's face and head, and held it until the victim expired. Finally, Hale took the body to Kentucky, where he dismembered it and disposed of it. He was permitted to plead guilty to three separate felonies: murder in the second degree, kidnapping in the second degree, and robbery in the first degree. All three of those

¹⁹ JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶ 56 (1995) [hereinafter *EVANGELIUM VITAE*].

²⁰ *Id.*

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sentences ran concurrently. He is now doing fifty years to life.

In the case of Darrel Harris, who was convicted of murder in the first degree and sentenced to death, Harris shot to death two patrons of an after-hours club. When a mother of five tried to escape, Harris chased her. She dropped to her knees and pleaded, "I have five children. For God's sake don't do this." Harris had run out of bullets, so he took a knife out and stabbed her to death. The Court of Appeals set aside the death penalty and Harris was sentenced to life without parole.²¹

In the third case, a defendant named Jerry Bonton set out to rob people who he believed were Jamaican drug dealers. It turned out they weren't drug dealers at all. When he barged into their apartments, he demanded money, and they refused to give it to him, simply because they didn't have it. He shot and killed one of the victims. The second victim pleaded for his life, but Bonton shot and killed him as well. Bonton is serving life without parole.

Of the four remaining cases, which are closed, two defendants are serving life without parole, a third is doing sixty-five years to life, and a fourth is doing seventy-five years to life. Four cases are pending, with no likelihood of remaining as death cases because of the recent ruling of the Court of Appeals.²²

Finally, if there should be public hearings on the restoration of the death penalty—and let me caution you, there were no public hearings the last time it was restored—but if there are public hearings in either house of the state legislature,

²¹ *People v. Harris*, 98 N.Y.2d 452, 496, 779 N.E.2d 705, 728, 749 N.Y.S.2d 766, 789 (2002) (vacating defendant's death sentence and remitting the case for resentencing).

²² *See, e.g., Lavallo*, 3 N.Y.3d at 128–31, 817 N.E.2d at 365–67, 783 N.Y.S.2d at 509–11 (invalidating the death penalty).

and my opinion is permitted, I'll urge that the death penalty not be restored, for the reasons I gave you. But, also for the reasons I stated, if the death penalty returns, I'll follow the law where it's appropriate.

Thank you.

Mr. Cody: Thank you, District Attorney Hynes. Kevin Doyle will now have thirty minutes to respond to the following question, which I will read, as well as to respond to District Attorney Hynes' remarks. The question for Capital Defender Kevin M. Doyle: The statutory mandate of the organization you head, the Capital Defender Office, is to ensure that defendants who cannot afford adequate representation in capital cases receive effective assistance of counsel. Accordingly, this state-established agency has consistently maintained that it functions as a Sixth Amendment right-to-counsel office and not as a politically active abolition advocate or moral-ethical think-tank.

In your personal capacity, however, you have often spoken and written about your Catholic faith and its influence upon your work in the capital punishment arena.²³ You have either authored or been the subject of articles in a variety of Catholic media, including *U.S. Catholic*, *Commonweal*, *America*, and *First Things*.²⁴ In each of these articles, you emphasize the influence of your Catholicism upon your views and your work

²³ See, e.g., *Avery Cardinal Dulles and His Critics: An Exchange on Capital Punishment*, *FIRST THINGS*, Aug./Sept. 2001, at 7, 11–12 [hereinafter *Cardinal Dulles and His Critics*] (containing a contribution to the column by Kevin Doyle); Kevin Doyle, *Let's Stick Up for Our Imperfect Church*, *U.S. CATH.*, Mar. 1, 2001, at 36 [hereinafter Doyle, *Imperfect Church*]; Kevin Doyle, *No Defense; Argument Against the Death Penalty*, *U.S. CATH.*, Aug. 1, 1999, at 18 [hereinafter Doyle, *No Defense*]; Kevin Doyle, *Who Lives in the Vatican? The Laity*, *COMMONWEAL*, Sept. 11, 1992, at 22 [hereinafter Doyle, *Who Lives in the Vatican?*].

²⁴ See George M. Anderson, *Capital Punishment in Perspective: An Interview with Kevin Doyle*, *AMERICA*, Apr. 20, 1996, at 16; *Cardinal Dulles and His Critics*, *supra* note 23, at 11–12; Doyle, *Imperfect Church*, *supra* note 23, at 36; Doyle, *No Defense*, *supra* note 23, at 18; Doyle, *Who Lives in the Vatican?*, *supra* note 23, at 22; see also Editorial, *The Innocence Protection Act*, *AMERICA*, Sept. 23, 2002, at 3.

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as an advocate.²⁵ In fact, in the [August 1999] issue of *U.S. Catholic* you stated, “When asked to explain why I oppose the death penalty, I cannot help but answer as a Roman Catholic.”²⁶

Discussion questions: Can you explain the effect of your Catholic faith upon your opposition to the death penalty and your work as a capital defender? How does it inform your work? And are there any times or ways in which your Catholicism conflicts or has conflicted with your work, particularly given that it is your duty as an advocate to obtain the best result for a defendant regardless of substantive law and justice concerns? Mr. Doyle—

Mr. Doyle: Ouch! It’s a pleasure to be here at Fordham. I didn’t get my law degree here, but, owing to three alumni, I feel great indebtedness to this institution. Tom Concannon, who is the head of the Federal Defenders Office in the Eastern District and one of the finest lawyers I know, did his best to try to teach me to put a little bit of compassion and cunning in all my advocacy. Rob Aiello, is a more recent graduate. I had the pleasure of working with him on a case up in Westchester not too long ago, a trial case that came to a successful end. And then there is the matter of my younger brother, who frankly, for most of my life, I had sort of thought I’d have to support him into his old age. Lo and behold, he came here, they dusted him off, made him a respectable citizen, he

²⁵ See Anderson, *supra* note 24, at 16 (discussing how throughout his career he has advocated on behalf of defendants against the death penalty and the moral implications of capital punishment); *Cardinal Dulles and His Critics*, *supra* note 23, at 11–12 (arguing that Avery Cardinal Dulles goes against the Church’s teachings in finding the death penalty acceptable for purposes of punishment other than incapacitation); Doyle, *Imperfect Church*, *supra* note 23, at 36 (describing the importance of the Church in people’s lives); Doyle, *No Defense*, *supra* note 23, at 36 (arguing as a Catholic against the death penalty); Doyle, *Who Lives in the Vatican*, *supra* note 23, at 22 (discussing the decline in Catholic identity); *The Innocence Protection Act*, *supra* note 24, at 3 (discussing flaws within the criminal justice system, in which there have been a number of cases where the wrong person was charged).

²⁶ Doyle, *No Defense*, *supra* note 23, at 18.

got on Law Review, and now he's someone from whom I can borrow money. So I thank Fordham for that.

Frankly, it would be hard to exaggerate the degree to which my opposition to the death penalty springs from my Catholicism. It probably springs from my Catholicism in more ways than I know, certainly since the late 1980s when I began doing capital work and at that time my initiation was through a pro bono case when I was on Wall Street. Since that time, every year I have discovered more deeply how much Catholic truths and my Catholic sensibilities come into play and are reinforced by doing capital work.

I would, though, just to simplify, say that there are basically three Catholic truths that underlie my convictions about the death penalty. I should emphasize when I say opposition to the death penalty, I don't mean that in an absolute way. I think that there have been times in history, and there may even be places in the world today, where execution is not only morally permissible but would be a duty. I think if we cannot incapacitate the killer through imprisonment, if we're in such a situation, that it may indeed be our obligation to put him to death. So when I talk about opposition to the death penalty, I mean opposition when we have the alternative of life without parole.

The three Catholic truths that set me against the death penalty under those circumstances—the first is that human beings are complex and they're prone to err. I grew up in a devoutly Catholic family, but not a simplistically Catholic family or a blindly Catholic family. When I say it wasn't simplistically Catholic, I don't mean that we sat around sipping sherry and dissecting Karl Rahner and Jacques Maritain. I do mean that in our house it was well understood that the world does not divide into saints and sinners, the damned and the saved, that things are not black and white. It was well understood that sin and

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salvation are ever lurking in every life and that the line between good and evil doesn't separate nations or groups or individuals, but rather runs through the human heart.

When you have that sensibility—and I would suggest that it's a deeply Catholic one—when you have that, it's a humbling thing. And, much quicker than leading you to a damning judgment, it would create difficulty if you were to be called upon to determine which murderer could be granted the mercy of life without possibility of parole and which murderer must die. It's a sensibility that really reflexively causes you to say "there but for the grace of God," rather than "vengeance is mine." So there is that.

And we were not brought up blindly Catholic. By that I mean simply this, that we were all imbued with a great love for the Church but we all understood its more colorful historical episodes. There was no sugar coating. We knew about Crusades, inquisitions, indulgence abuses, and all that. And if you believe, as we did and I do, that the Church is the best expression, not the perfect expression, but the best expression of Christ's truth, if you believe that on the one hand, and on the other hand are intellectually honest enough to own up to its scandals and its missteps throughout history and even today, if you have that view of things, well then, naturally, you're going to have a very healthy skepticism when you view secular institutions—institutions that were not founded by Jesus, institutions that are not guaranteed protection by the Holy Spirit.

Thus, I have a pretty clear-eyed view of our criminal justice system. As much as I commend its aspirations and try to contribute to it being as just as possible, I'd be foolish not to acknowledge its profound fallibility, and I'd be foolish not to look just at the statistics regarding the death penalty in this country over the past few decades. Since 1973, roughly 7500—and I'm saying "roughly" because I have had to do a little projection and cobbling

together Justice Department statistics—but roughly 7500 people have been sent to death row.²⁷ During that period, over 100 were released in the wake of evidence either clearly establishing or strongly pointing to their innocence.²⁸ That is a frightening rate of error. Frankly, if I could do math, I would have been a doctor, not a lawyer, but it does come to more than 1%. I know that much.

I also know that these exonerations very, very often were really by chance. I mean just one experience from when I was in Alabama—we represented in our office, particularly Bryan Stevenson and Michael O'Connor, a man named Walter McMillan who had been on death row in Alabama for eight years, owing in part because they put him there pre-trial. He was African-American, a middle-aged man. He was there for killing a pretty young white clerk at a dry cleaners. He had a sentence of death. Fortunately, he had Bryan and Michael as his attorneys.

As they got underway in their post-conviction investigation, they were given by a sloppy sheriff the whole case file—the raw, disorganized case file, a box or two. And there was a cassette in there. The cassette had the statement of the main witness against Mr. McMillan. They plucked it into the tape recorder, they listened to it, and then the statement is finished, right?

Then one of them thinks, “I wonder what’s on the other side of the cassette.” Thankfully, the sheriff never checked this before the file was turned over. Well, they flipped it over and they found that on the other side was this witness complaining bitterly about why the sheriff was forcing him to frame Walter McMillan. That’s a

²⁷ See THOMAS P. BONCZAR & TRACY L. SNELL, BUREAU OF JUST. STAT, CAPITAL PUNISHMENT, 2003, at 14 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf> (stating that 7403 people were sentenced to death between 1973 and 2003).

²⁸ See Leonard Post, *ABA Death Penalty Guidelines Languish*, NAT’L L.J., Jan. 5, 2004, at 4 (“Since 1973, 112 people in [twenty-five] states have been released from death row because of evidence of their innocence.”).

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shocking thing, and it's absolutely unembellished truth what I just told you. That's a shocking thing.

You know, it's remarkable in this country. If a plane crashes, there is a major reconstruction undertaken, a major investigation, a major inquiry, with formal findings, right? And yet these kinds of mistakes, it barely caused a pause in the capital justice system in Alabama. I mean think about it. If you had the capital justice error rate, if you went to the FAA and you said, "You know, I'm not certified as an aviation engineer, but I like to doodle, and I put together this little aircraft and I'd like you to certify it for flight and oh, but by the way, on every hundredth landing it almost crashes"—they'd laugh you out.

If you went to the Food and Drug Administration and said, "I'm not a chemist but I like to fool around with substances in my garage and I've come up with this little nifty concoction. Now, it has no proven benefits, it has a completely unpredictable effect on 12% of the people who take it, and by the way, there is near fatality on every hundredth dosage"—they would laugh at you, right?

If you went to the Federal Election Commission—well, forget that one. You see the point, right? How can we tolerate this? Well, I'm afraid part of the answer is that the people who are in the risk pool tend to be lighter in wallet and darker in complexion than the folks who most often fly airplanes or take prescription medications. The people who are subject to these mistakes are overwhelmingly, as District Attorney Hynes pointed out, deprived and they tend to be in racial minorities.

This brings me to the second Catholic truth which sets me against the death penalty, and that is the belief that racism is mortally sinful. Now, partly owing to when I was born and how my parents raised me, I have a particularly strong sense of this in how my parents raised me. They

named me after Martin de Porres. I grew up during the civil rights movement, so this was pressed upon me. But the notion that racism is sinful is not some liberal Catholic figment of imagination, right? I mean this really is built into the claims of Catholicism to its claims of universality and its whole view of humanity.

When you look at our death penalty, you realize that it has always been riddled with racism. I mean in the slave codes, in the lynchings, the thousands and thousands and thousands of lynchings that took place in this country just between like 1882 and 1968.²⁹ And today it persists. There is virtually no death row in the country where racial minorities are not wildly over-represented.³⁰ And it's not just in terms of the race of the defendant; it's also in the race of the victim. When I was in Alabama, over 80% of the folks on death row were there for killing white folks, and yet the majority of homicide victims, the majority of murder victims, in Alabama are black.³¹

A more refined look was taken by David Baldus, a law professor, who studied Georgia, who found that a defendant on trial for killing a white

²⁹ See FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 90 (2003) ("The archives at Tuskegee Institute report a total of 4743 deaths by lynching in the United States during the period 1882 to 1968.").

³⁰ See William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 413, 463 (James R. Acker et al. eds., 2nd ed. 2003) ("Accusations and evidence of racism have stalked capital punishment in America since colonial times. The use of the death penalty since *Furman* has been racked with disparities by race of defendant and victim . . ."). *But see* STUART BANNER, *THE DEATH PENALTY* 289 (2002) (finding that although before *Furman* "black defendants were sentenced to death at higher rates than white defendants" later econometric studies revealed that "[i]n some states the race of a defendant was no longer a factor influencing the likelihood of a death sentence"). See generally SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 535 tbl.6.80, available at <http://www.albany.edu/sourcebook/pdf/t680.pdf> (last visited Oct. 21, 2005) (providing statistics of the race of the defendants sentenced to death in each state).

³¹ See *Carter Center Symposium on the Death Penalty*, 14 GA. ST. U. L. REV. 329, 372 (1998) ("Although 67% of all murder victims in the State of Alabama are black, 84% of all people who have been sentenced to death in that state have been sentenced to death for crimes committed against people who are white.").

victim was roughly four times more likely to get a death sentence than someone on trial for killing a black victim or a non-white victim.³² That's Georgia.

But don't make any mistake. It's not just the South. There was a *Cornell Law Review* [article] in 1998 that published a study that was done out of Philadelphia.³³ They found that a person who was on trial, a capital defendant on trial, who was non-white compared to a similarly situated—and with as bad a crime as a—white person, was over three times as likely to draw a death sentence.³⁴ I mean that's striking. That alone should stop us in our tracks. And particularly if we understand how this racism is not just malicious. Sometimes it's malicious, sometimes it's deliberate, sometimes it's cynical, sometimes it's intentional, but it's also in some ways, and I'm reluctant to use this word for so horrible a thing as racism, but sometimes it's sort of innocent.

I mean this: there is built into a penalty phase a basic dynamic of empathy. That is, if the defense is doing it right. Let me be clearer. For a defense attorney to succeed in a penalty phase, for a defense attorney to convince a jury that this person doesn't have to be executed but they can simply be put away for the rest of their life without parole, typically to bring about that result means that just for a nanosecond that the jury looks at

³² See Alex Lesman, *State Responses to the Specter of Racial Discrimination in Capital Proceedings: The Kentucky Racial Justice Act and the New Jersey Supreme Court's Proportionality Review Project*, 13 J.L. & POL'Y 359, 369 (2005) ("Baldus concluded that Georgia defendants who killed whites were 4.3 times more likely to receive a death sentence than defendants who killed blacks.").

³³ David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1662 (1998).

³⁴ See *id.* at 1726 (finding that after comparing the "odds of a death sentence for black defendants to the odds faced by similarly situated nonblack defendants . . . on average, black defendants in Philadelphia face odds of receiving a death sentence in a penalty trial that are 9.3 times higher than the odds faced by nonblack defendants with comparable levels of culpability").

the person and says “there but for the grace of God go I,” that there’s something in them that they can identify with.

Race is just a barrier to that. That may be the human condition, it may be the American condition in 2004, it may be the world condition in 2004, maybe it goes to Original Sin. I don’t know. But it is the truth. In fact, it’s one of the few things Justice Scalia and I agree on. In some memoranda that were released through Justice Marshall’s papers, there was found the concession that “ ‘[t]he unconscious operation[s] of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in [] decisions of this Court, and ineradicable.’ ”³⁵ So there’s the problem of racism.

And then, the third Catholic truth that puts me in opposition to the death penalty is the simple belief that all human life, every individual human life, is a sacred thing. I think, as much as you can criticize the Church’s handling of this issue or that issue or whatever, I have no doubt that in a century that people will look back and see the great prophetic voice of the Church on behalf of the sanctity of human life.

I mean it is frightening. If you step back and examine how casual we are now about the sanctity of human life, it’s amazing. The fact that assisted suicide is spoken about so much more than guaranteeing good hospice care. The fact that assisted suicide—that suicide’s advocates of it are so sloppy. There was a column in *The New York Times* by one of its regular columnists, who ordinarily makes a lot of sense, advocating assisted suicide for a fellow who had just received a cancer diagnosis. I happen to know about this cancer

³⁵ BANNER, *supra* note 30, at 290 (quoting Memorandum from Antonin Scalia, Associate Justice, United States Supreme Court, to the Conference of Supreme Court Justices (Jan. 6, 1987)) (unpublished document, on file with Thurgood Marshall Papers, Manuscript Division, Library of Congress, Box 425).

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because of some family history. This guy didn't need assistance in his suicide; he needed a psychiatrist and a new oncologist. *The New York Times*, for sure, heard about its gaffe but unfortunately failed even to print any corrections or clarifications.

Assisted suicide is something that even now is seeping into our entertainment. I rented a DVD to watch with my kids. Frankly, it was about an Irish outlaw in the Australian outback. I sort of knew, frankly, there were going to be parts I was going to have to fast-forward through because—that's why God made remote controls. I didn't expect there to be two separate episodes in this movie that were basically little infomercials for assisted suicide. I swear. The name of the movie is "Ned Kelly."

So the way we talk about assisted suicide—the way we discussed war in Iraq. Now, let me emphasize I'm not talking about whether we made the right decision or the wrong decision, whether the results are good or the results are bad. I'm not talking about any of that. I'm saying that the way we discuss that certainly says a lot about our views regarding the sanctity of human life. Think about how citizens—they weren't misinformed, they voluntarily misinformed themselves about links between Saddam Hussein and the tragedy of the World Trade Center. Even when they weren't being told that there were links between the two, a huge number of Americans thought that because they didn't bother to do their homework before making a decision about what we should be doing. Think about how nonplussed people were about the shift in justifications for the war. And again, maybe some of those justifications were well taken. That's not my point.

Think about when the Pope had the audacity to say, "Wait a minute, preemptive war, going against Iraq, that's wrong, we shouldn't do

it.”³⁶ Bill O’Reilly—who for better or worse is one of our most watched political commentators—he takes to his pulpit and starts attacking the Vatican with this old nonsense, this revisionist crap, about Pius XII being soft on the Nazis and having turned his back on our Jewish brothers and sisters.³⁷ But that was the level of discourse before we launched a war!

Most importantly—and I’m sure I will displease some of you by bringing this up—if you want to look at how devalued our attitudes are about the sanctity of human life, look at how we discuss abortion. Now, we don’t have to agree on what greater legal protections the unborn should have or what strategies are appropriate or where lines are drawn or anything like that. But just look at how we discuss it.

I was at Rose Hill as a philosophy major in the 1970s. It was a great department and they made us read a very broad range of philosophers. But naturally, it was a Jesuit university and they were very insistent that we spend time on Natural Law theory. At the time, one of the great Natural Law theorists was a guy, really the ethics star of Princeton University then, a guy named Paul Ramsey. I think he was Methodist. Very, very smart man, very wise man. He framed the abortion issue not dogmatically, not in some unreasonable “we can’t discuss this” fashion. He framed it this way: he said, if you’re going to justify abortion at any particular gestational stage, if you’re going to do that, then just be able to morally

³⁶ See, e.g., Elisabeth Bumiller, *Peace Envoy from Vatican in U.S. for Talks with Bush*, N.Y. TIMES, Mar. 4, 2003, at A12 (chronicling Pope John Paul II’s peace diplomacy and calling him “a worldwide moral voice against a potential war against” Iraq).

³⁷ See, e.g., JOHN CORNWELL, *HITLER’S POPE: THE SECRET HISTORY OF PIUS XII*, at 4–7 (1999) (depicting the “fatal and culpable influence” of Pope Pius XII and his purported partnership with Hitler).

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distinguish it from infanticide.³⁸ I think that makes a lot of sense, that approach.

Now fast-forward to today. Now the philosophy star at Princeton is not Paul Ramsey any longer, it's a man named Peter Singer. Peter Singer's view—forget abortion—his view is that parents should have a period of days after birth in which to determine whether or not the infant is up to snuff; and if the infant is not up to snuff, the infant may be snuffed.³⁹ That's a remarkable and frightening shift.

Therefore, I think it was extremely wise for the Church to reinforce and rethink and press on the importance of giving witness to the sanctity of human life when it came even to convicted murderers. Now, conservative Catholics will say, "Well, you know, a convicted murderer is not an innocent unborn child, a convicted murderer is not a terminally ill patient," and of course that's all true. And yet, the Holy Father was wise and bold and clear when in his Encyclical of 1995, *The Gospel of Life*, he included euthanasia and abortion and the death penalty all in the same chapter, Chapter three.⁴⁰

So those are the three Catholic truths that bring me to oppose the death penalty and to some extent fuel my convictions. As to how my Catholicism informs my work, I'll tell you very mundanely that my office runs heavily on a principle of subsidiarity. That is to say that there's not unnecessary centralizing of decision-making. I mean, frankly, I don't know that there's another way to run a trial office. We have a tremendous

³⁸ See PAUL RAMSEY, *ETHICS AT THE EDGES OF LIFE* 190 (1978) (encapsulating his "logical reasoning that many arguments favoring abortion would also justify infanticide").

³⁹ See HELGA KUHSE & PETER SINGER, *SHOULD THE BABY LIVE: THE PROBLEM OF HANDICAPPED INFANTS?* 132–37 (1985) (likening the newborn to a fetus, lacking personhood and any attendant right to life).

⁴⁰ *EVANGELIUM VITAE*, *supra* note 19, ¶¶ 56, 58, 64 (discussing the death penalty, abortion, and euthanasia, respectively, as manifestations of the "culture of death").

amount of collaboration, but ultimately responsibility is fixed with team leaders and, even after much wailing and gnashing of teeth and debate and disagreement, the decisions finally go to those team leaders.

The other Catholic principle in running the office is personalism. That's a term the Pope has brought back into fashion now, but back when I was at Fordham, really it was something identified with the fairly obscure French philosopher Mounier. That means seeing my co-workers as being three-dimensional human beings, not cogs, not means to my end of having a successful office, but people who have spiritual, moral, emotional, psychological, family, individual dimensions.⁴¹

So those are sort of the more concrete ways in which my Catholicism informs my work. As to how my Catholicism hinders my work, first let me follow up on the suggestion that there might be a problem having to press for substantively the most favorable results, notwithstanding what I might suspect is the most just result, whether that's a problem; it's not. I mean I think as Catholics we should take great pride in the Catholic contributions to jurisprudence, and I think we should be aware that a Spanish priest named Suarez was the virtual founder of international law.⁴² I think we should be aware that what we think of as being the common law tradition of Protestant England is in fact, as Norman Cantor points out, really the fruit of Catholic England.⁴³ I

⁴¹ See, e.g., Seth D. Armus, *The Eternal Enemy: Emmanuel Mounier's Esprit and French Anti-Americanism*, 24 FRENCH HIST. STUD. 280 (2001), available at http://muse.jhu.edu/journals/french_historical_studies/v024/24.2armus.pdf (outlining personalism's "essential concepts" as spirit, civilization, and culture, and its goal as "[reconciling] the old conflict between individual and community").

⁴² See, e.g., Mark Weston Janis, *Religion and International Law*, ASIL INSIGHTS, Nov. 2002, <http://www.asil.org/insights/insigh93.htm> ("The [Sixteenth] Century Spanish Catholic priest[] Suarez . . . [is] often viewed as among the founders of the modern discipline of international law . . .").

⁴³ See NORMAN F. CANTOR, IMAGINING THE LAW 190 (1997) ("The point of deep inauguration of the common law had been reached by the start of the reign of

think we should know that medieval canonists really were the people who instituted many things we identify with due process today, such as recordation and rules of evidence. I think we should know all that, take pride in it.

But I also think that we should be realistic about our less glorious moments. One is, of course, the Inquisition. Now, Henry Kamen says, and argues pretty well, that the scope and severity of the Inquisition has been exaggerated over history,⁴⁴ and that's probably true. But I mean, let's be honest, it was no bargain, right? I think to imagine that we would want to have an inquisitional system of justice, as opposed to an adversarial system of justice, I mean that's unthinkable to me. I have no problem—as a defense lawyer—I have no problem at all, holding the prosecution to their burden of proof beyond a reasonable doubt; I have no problem advancing the interpretation of the evidence that will best fit the needs of my client.

Do I wish that there was a finer integration of Catholic thinking and the adversarial system? Are there times when I sort of have pause? Back when I was a lawyer at Legal Aid in The Bronx, I can remember getting a plea bargain for a guy, a kid, who was just a compulsive rapist, and I remember being troubled thinking that this kid's going to be out on the street earlier than he should be, if he ever should be. I mean this kid would rape just as sure as this pen now drops to the podium. So am I troubled? Yes, at times. By the adversarial system? Yes, at times. But do I think there's a better system? Not that I've heard of—and I'm all ears.

Edward I in 1272 and significant judicial growth and adaptation continued to the end of the reign of Henry VIII [in 1547].”).

⁴⁴ See HENRY KAMEN, *THE SPANISH INQUISITION* 305 (Yale Univ. Press 1998) (1997) (“Bearing in mind the very small number of Protestants ever executed by Spanish tribunals, the campaign against the Inquisition can be seen as a reflection of political and religious fears rather than as a logical reaction to a real threat.”).

There is an odd way, though, in which my Catholicism does impair me, not in the courtroom but in dealing with my clients at times. Many, many capital clients, notwithstanding what some cynical prosecutors would have you believe, many of them truly do come to grips with, and are genuinely contrite about, what they have done. Not all, however. At the risk of sounding old-fashioned, I worry about the souls of some of my clients, or some of my past clients. It's a tricky thing, because you cannot—with many clients—you cannot advocate for them effectively, have the trust that is required to represent them capitally, and at the same time in any way confront them over what they have done.

There was a lawyer in the Deep South who represented a fellow. The lawyer picked the case up on state post-conviction, got the case, lost on the petition in the trial court, won in the appeals court, won again in the next appeals court, went back to remand in the trial court, and basically there was going to be relief now. The widow of the victim for whose death the defendant had gotten the death sentence was in the courtroom. The defendant said to the lawyer, "Well, what's she doing here?" The lawyer, not in a hostile, not in a nasty, not even in an accusatory way, maybe slightly accusatory, said, "You know, you ruined her life. You killed her husband." Well, it would be putting it mildly to say the tenor of client-attorney relations changed with that remark.

I hope I haven't been too roundabout, but just to be clear, I don't mean to be presumptuous in saying that I'm such a great moral guy, that it's my job to do it, but it is hard sometimes engendering the sense of moral responsibility that some, maybe a minority, of capital defendants lack. Let me just say one other thing actually, a way in which my Catholicism is a bit of a hindrance to me as an advocate, not as a lawyer but as an anti-death penalty advocate. I think that the death penalty is played with a lot intramurally within the Church. I was on a panel a few years ago in Texas with a

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very well-known Jesuit, and he got up and he talked about the death penalty. He didn't like the death penalty at all. He was thrilled that the Church now opposed the death penalty, but he was even more thrilled that this was evidence that Church teaching can change—zing, zing—because that's sort of the liberal Catholic agenda, right? So the implication is, if we can change on this, we can change on all these other things, right? That was where his focus was, right?

And then I was at another program where I heard a very distinguished and fine Jesuit speaking about the death penalty, and that Jesuit—a very, very distinguished scholar and a fine man—he rendered a version of current Church teaching which would be beyond recognition to anybody who has read the Encyclical *The Gospel of Life* or the Catechism. The point is that this wasn't because he was pro death penalty; it was because he feared the idea that if there was precedent for change in Church teaching, well then we're on the slippery slope and all hell is going to break loose.

That stuff as a Catholic ticks the heck out of me, infuriates me. I think it makes the Church look stupid, very stupid, which it has been pretty good at lately, and it really reduces things to gamesmanship. I probably get a little more irritated about that than I should, and I'd probably be a better advocate against the death penalty if I summoned more patience.

Just a few minutes to address District Attorney Hynes' remarks—first, I'm glad that he talked about the facts of the murders that he has prosecuted, because I think often—I don't know what the division in the audience is pro-death penalty/anti-death penalty—but I think often people lose sight of the fact that these are typically hellacious crimes, horrible crimes, with tremendous, tremendous suffering, not just suffered by the decedents prior to their death, but suffering that reverberates into their family and

their loved ones. I think it's important to be attentive to that.

I also, listening to District Attorney Hynes, was reminded of what Niebuhr, that great Catholic theologian, said. He said, in the world you can either be pure or you can be responsible, but you can't be both.⁴⁵ I think that, notwithstanding District Attorney Hynes' personal opposition to the death penalty, he has chosen to be responsible. He and I have disagreed about things. I'm sure we will again in the future, but I have to say that in certain respects he has been among the most responsible capital prosecutors in the state.

I would disagree—although I'm a little deaf in one ear, so it may be my hearing at fault and not the District Attorney—but I do think that the Church teaching is a little stricter against the death penalty than perhaps the District Attorney does. When I read the Encyclical, I read that we “ought not go to the extreme of executing the offender except in cases of absolute necessity,”⁴⁶ in other words, when it would not be possible otherwise to defend society. Today, however, as a result of steady improvements in the organization of the penal system, “such cases are very rare, if not practically non-existent.”⁴⁷ I think a good-faith reading of this is that if you do have life without possibility of parole, if you are in that civilized setting, then the death penalty is off the table.

Thank you very much.

Mr. Cody: District Attorney Hynes will have ten minutes to respond to Mr. Doyle's remarks.

Mr. Hynes: First, I agree with Kevin's observation about my responsibility. I guess there are two things that

⁴⁵ See REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* 264 (SCM Press 1963) (1932) (“Nothing is clearer than that a pure religious idealism must issue in a policy of non-resistance which makes no claims to be socially efficacious.”).

⁴⁶ *EVANGELIUM VITAE*, *supra* note 19, ¶ 56.

⁴⁷ *Id.*

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trouble me. They're not really about Kevin's presentation, but about what the state of the record is. One of the disagreements we had publicly was—I said to one reporter that Kevin had spoken to, "This is not Alabama." That's the perversity of it. We are unlikely to make the kind of mistakes—intentional mistakes, maybe, that's not a mistake. We're unlikely to do that in New York State. That's the perversity of this statute.

The second thing that troubles me is I think a fair reading of Avery Cardinal Dulles' speech here at Fordham six years after *The Gospel of Life* Encyclical by the Holy Father makes it very clear, according to Cardinal Dulles, that "[t]he Catholic magisterium does not, and never has, advocated unqualified abolition of the death penalty."⁴⁸ I know of no official statement from popes or bishops, either past or present, that denies the right of the state to execute.

For me it would be very simple if the Pope said tomorrow, *ex cathedra*, "capital punishment is wrong; it's immoral." Then I have no problem. I recuse myself as a Catholic. I think that might lead to Pataki removing me, as he did Johnson, but I don't conceive of him ever removing any of the district attorneys. I think he finally realized that it was a mistake that he did. So that's easy for me if the Church was clear about it. But they're not, and I don't know why the Holy Father is not so clear. If he has evolved to a point that he agrees with the Catholic bishops that it's wrong, then say so for heaven's sake. Those are the two observations I have.

Mr. Cody: Questions from the field?

Question: District Attorney Hynes, isn't it enough that the Catholic Bishops—U.S. Bishops—have issued a strong statement in opposition to the death

⁴⁸ Avery Cardinal Dulles, *The Death Penalty: A Right to Life Issue*, Laurence J. McGinley Lecture at Fordham University (Oct. 17, 2000) (transcript available at <http://pewforum.org/deathpenalty/resources/reader/17.php3>).

penalty?⁴⁹ Isn't that enough for a Catholic to say that there is some sort of conscientious objection that can go on there to the death penalty?

Mr. Hynes: They don't carry the force, effect, or authority of the Holy Father. You know, God knows, we all know, those Catholics among us, that the Catholic Bishops have been at divide with the Holy Fathers past and present over a number of issues.⁵⁰ So I don't think they have the authority I look for as a Catholic. That would come only from the Holy Father.

Mr. Cody: Would you like to respond?

Mr. Doyle: I agree with District Attorney Hynes that the Bishops' Conference—you have to be attentive to them but they're not binding. Avery Cardinal Dulles actually is the second Jesuit to whom I referred in my remarks. I would urge you—because this is all arguing about how many teeth the horse has when the horse is outside—to read the Catechism yourself. Note that it was revised specifically to strengthen its opposition to the death penalty. Read the Catechism itself, read *The Gospel of Life*, and then read Avery Dulles' treatment.

Avery Dulles doesn't even mention the term. When he gave the address at Fordham, he didn't even mention the term "absolute necessity."

⁴⁹ See A GOOD FRIDAY APPEAL, *supra* note 4 (calling on Catholics to oppose capital punishment). *But see* Joseph Cardinal Ratzinger, Worthiness to Receive Holy Communion ¶¶ 2–3 (June 2004), available at http://catholicculture.org/docs/doc_view.cfm?RecNum=6041 (explaining that capital punishment, unlike abortion and euthanasia, does not obligate conscientious objection by Catholics).

⁵⁰ See CARL BERNSTEIN & MARCO POLITI, HIS HOLINESS: JOHN PAUL II AND THE HIDDEN HISTORY OF OUR TIME 509 (1996) ("In January 1995, French bishop Jacques Gaillot was summoned to the Vatican and removed from his diocese with no prior warning because he had insisted on speaking out in favor of married priests, the use of condoms by people with HIV, and respect for committed homosexual relationships."); Helen Hull Hitchcock, *Bishop Criticizes Vatican, Praises ICEL*, ADOREMUS BULL., May 2000, <http://www.adoremus.org/0500-Trautman.html> ("Recent statements by Erie Bishop Donald Trautman sharply criticized Vatican 'interference' in the affairs of bishops and national conferences concerning the liturgy.").

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I don't think that was because he was trying to be cute or because he likes the death penalty, because he doesn't. But, because he is concerned about the stability of the Church, he is trying to minimize that there has been a definitive shift in Church teaching. But read it yourselves. You can pull this up on the Web.

Mr. Cody: We'll take the next question here.

Question: I wonder whether District Attorney Hynes might agree that there are at least two instances when the death penalty is a deterrent: a failure to return a kidnapped victim alive—the result is the death penalty; a person serving a life sentence for murder who commits another murder in aid of an escape from that life sentence?

Mr. Hynes: Well, I mean, again, I'm not persuaded that either one necessarily should trigger capital punishment. I think as to the latter, it has a lot to do with the Department of Corrections and the way it deals with someone who is permitted to roam an institution so that he kills again. Again, I go back to whether or not capital punishment, however horrible it is, deters. I don't think there's any evidence that either kidnapping or any other form of murder is deterrable.

Mr. Doyle: Can I try to respond?

Mr. Cody: Please.

Mr. Doyle: You know, sir, I think that those are intriguing questions. I point out, though, two things. Most often those questions are raised by people who don't want a narrow death penalty; they want a death penalty which is as broad as the one we have now, which is a murder thing.

Secondly—and this is just something to think about, right?—since 1995, there have been fifty-seven death notices filed around New York

State.⁵¹ Not one has come out of a prison. I think in the abstract you'd say, "Yeah, if a guy is doing life without parole, you need something extra to deter him." But it's telling that not one has come out of the prison.

Questioner: Therefore, it would be rare to impose the death penalty in such a case?

Mr. Doyle: You know what? If we had a narrow statute that just had that, I'm not going to lose any more sleep than I did had I been more than a child when Eichmann was killed.

Question: Thank you. So back to Catholic teachings—on which I am not an expert, and I only had a chance to very briefly read some of the materials here—it seems to me that you are talking about whether the Catholic Church or the Holy Father is against the death penalty and not saying any more. It seems to me from what I've seen that he is against the death penalty unless it is necessary, and with that qualification, why is that not a position that Catholics must adhere to and must evaluate the situation? If in fact there is no necessity, then the Holy Father says you're supposed to be against the death penalty.

Mr. Hynes: I don't know why there's any hesitance. I mean it's like him telling me that he has an opinion on the Mets. I have an opinion about the Mets too, and it's not a very good one. I don't know why it's so complicated, except that—and this is a terribly cynical thing for a Catholic to say—I look at the polling data and I'm reminded that the Church listens to the media, just like the United States Supreme Court listens to the media. The polling

⁵¹ See Capital Defender Office, Defendants Subjected to a CPL 250.40 Notice (Death Notice) by Counsel Type and Outcome, 9/1/95–9/30/04, http://www.nycdo.org/caseload_040930_current.html (last visited Oct. 21, 2005) (listing fifty-eight death notices filed in New York State since 1995).

data is shocking to me. The vast majority of Catholics in this country favor the death penalty.⁵²

Now, there has been a decided drop in that number, from 79% to 69%, over a ten-year period.⁵³ When the Quinnipiac Poll came out in 1995 or 1996, it found that most people—they didn't identify Catholics—most people in this state believe, as I do and as Kevin believes, that life without parole is a far more punishing sentence.⁵⁴ And then it has this incredible statistic: that 60% would still favor the death penalty.⁵⁵

Look, I'm not going to quarrel with the Pope, it's not good for my immortal soul, but I don't know why it's so complicated. Let him say what he means, and he can do that *ex cathedra*. He can say it from the Chair of Peter and it becomes powerful, authoritative, and for me that ends it, and it probably ends it for most of our prosecutors in New York State—elected prosecutors, who are Catholic.

Question: I know we have spoken a lot about the Pope, and rightly so in this context. What about Jesus? You are both Catholics. Do you have any ideas on

⁵² See Joseph Carroll, Gallup Org., Gallup Poll: Who Supports the Death Penalty? (Nov. 16, 2004), <http://www.deathpenaltyinfo.org/article.php?scid=23&did=1266> ("More than [seven] in [ten] Protestants (71%) support the death penalty, while 66% of Catholics support it.").

⁵³ Recent findings suggest that the number of Catholics against the death penalty have increased substantially more than 10%. See Public Opinion: Zogby Poll Finds Dramatic Decline in Catholic Support for Death Penalty, <http://www.deathpenaltyinfo.org/newsanddev.php?scid=23> (last visited Oct. 21, 2005) ("A national poll of Roman Catholic adults conducted by Zogby International found that Catholic support for capital punishment has declined dramatically in recent years. . . . The poll revealed that only 48% of Catholics now support the death penalty.").

⁵⁴ See Gregg Birnbaum, *Poll: Life Sentence Worse Than Death*, N.Y. POST, Mar. 26, 1998, at 18 ("The [Quinnipiac] poll revealed that [54%] believe life without parole is a harsher sentence than capital punishment, while [41%] said the death penalty is worse.").

⁵⁵ New data reveals that the percentage of New Yorkers favoring the death penalty may have dropped slightly under 60%. See Frequently Asked Questions About the Death Penalty, New Yorkers Against the Death Penalty, <http://www.nyadp.org/media/factsheet.pdf> (last visited Oct. 21, 2005) ("In a poll released by Quinnipiac University in March 2003, [57%] of New York residents favor the death penalty compared with [37%] who oppose it.").

Jesus and death penalty? And what made, in your opinion, South Africa, when Mandela was released, almost immediately abolish the death penalty—something which you would have understood that they would have said, “Okay, now it’s our turn?” Not only did they abolish it, they set up a Commission of Truth and Reconciliation. In my view, that’s moral superiority to the United States. That’s my view. How do you explain that—Jesus and South Africa?

Mr. Cody: Take each question in turn, starting with the Jesus question.

Mr. Hynes: I think if you look at the writings about Jesus, there doesn’t appear to be, from what I look at, any definitive statement from Jesus on the death penalty, on the execution, on the taking of life. So I guess one could argue that if Jesus wasn’t opposed to it, why should the Pope? That may be my misreading because I’m not a theologian, obviously.

South Africa is easy for me. They are more progressive than we are. I mean the problem, as I said before—and I’m not here to bash or attack the Governor—the plain fact is the public was told that murder rates would drop. They were already dropping—dropping dramatically, for a hell of a lot more reasons than the establishment of the death penalty. I assure you that there was no convention of potential murders in 1995 saying, “Uh oh, we better knock it off because Pataki’s in.” I mean it would be absurd to believe that. But South Africa is more progressive on this issue than we are.

Mr. Cody: Kevin?

Mr. Doyle: You know, on Jesus, I said at the beginning that I can imagine circumstances in which the death penalty is not only permissible but obligatory. Obviously, if I thought Jesus thought otherwise, if I thought Jesus was a pacifist, then I would have to reject the death penalty under all circumstances. I do think it’s very telling that there is, of course, a

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penalty phase that occurs in the New Testament, when the woman is caught in adultery and they catch her on the spot. It's a capital offense and part of it goes to the cohesion of the community.⁵⁶ He, of course, basically commutes the sentence.⁵⁷

Here's what I think is most clear from the New Testament: that the ethic should be one not of retribution, but of mercy. If you had to sum up the New Testament in one word, it's that. That's not trying to make Jesus out as some kind of a hippy, a mellow guy. I mean that is what is there, forgiveness and mercy. So certainly there's no retributive justification for the death penalty in the New Testament. Therefore, if under some circumstances responsibility requires us to inflict it, once those circumstances have fallen away—as they have in this society where we have life without parole—then I think we can more genuinely embrace the ethic of forgiveness and mercy.

Mr. Hynes: God forgive me, I'm not nearly as Catholic as Kevin is. Listening tonight, I'm very, very proud of his Catholicism to some extent. But I have no mercy for someone who kills the way Michael Shane Hale killed. I think he should be locked up in a hole for the rest of his life. I think he should be held without any communication with any other human being for ending the life of another person, that his life should be over. So I can find no mercy for those kind of people. My argument on the issue is I believe life without parole is a hell of a lot more punishing.

Mr. Cody: Mr. Doyle, do you want to comment on South Africa?

Mr. Doyle: No.

⁵⁶ *John* 8:4–5 (New American) (“They said to him, ‘Teacher, this woman was caught in the very act of committing adultery. Now in the law, Moses commanded us to stone such women.’”).

⁵⁷ *See id.* at 8:7–11.

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Mr. Cody: We'll take the next question then.

Question: Hi. Good evening. District Attorney Hynes, you mentioned before that you would recuse yourself from a case involving the death penalty if the Holy Father says that the death penalty is now immoral. It seems to me that is the problem that we Catholics have faced when we enter government. I know J.F.K. faced that when he ran for President. How do we respond to a situation in which the Vatican takes a position that is different from what the Constitution obliges you to take, which is pretty much set forth?

Mr. Hynes: I mean look, the Vatican has taken a very, very strict position on abortion. My position is that I think abortion is appalling, but I can never think of anything that would lead me to believe that a woman should be prosecuted for having an abortion. I hope that doesn't sound pro life or pro choice, because I don't talk in those metaphors. That's a position, I suppose, which could lead me to be denied communion. I hope that doesn't happen. But the death penalty decision is an infinitesimal part of my decision-making as the District Attorney. It's a very, very small portion. I think I can limit my recusal based on that reality. I don't always agree with the Church.

Mr. Cody: I had a question on that. District Attorney Hynes, it seems like you acknowledge that the Catholic Church has, at least to some degree, opposed the death penalty. But I believe you also stated in the very opening portion of your remarks that that doesn't influence you at all. I suppose the question, or the conflict, that ran through my mind—to paraphrase St. Thomas More, and that I think this is at the crux of our discussion tonight—is: are you then God's good servant but Kings County's first?

Mr. Hynes: Well, God's good servant is not listening to the teachings of his Church, because the teachings of the Church are at best ambiguous. It's one thing to say, "Look at his words. He's pretty clear, isn't he?"

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He doesn't like the death penalty. He's for abolishing it." Well, say so for heaven's sake. So until the Church, or the Church through its Holy See, says definitively it is immoral, then I have to do my responsibility the way it is. Maybe I won't have to worry about that if the legislature doesn't restore the death penalty. I don't think, by the way, that is going to happen. I don't think they are going to restore it.

Question: If in fact the Holy Father did come out with the pronouncement that you're looking for, and you decided that at that point you would take the position that you would not impose the death penalty, not seek the death penalty, in cases in Kings County, do you think you would ever be elected District Attorney again?

Mr. Hynes: Oh, absolutely, absolutely. My electorate, at least the primary, tends to be much more progressive. I think they cluck their tongue when they see me asking for the death penalty because they know overall I'm pretty progressive. But sure, I won't lose the election on the death penalty issue.

Mr. Cody: Over on my far left.

Question: District Attorney Hynes, don't you ever envision a time when you might have greater insight to the good, the bad, or the evil than the Pope or somebody else? Don't you envision the possibility that you might see this is the wrong thing, as opposed to the Pope waiting to make a decision?

Mr. Hynes: Well, at sixty-nine I have a lot of room. I mean Morgenthau is eighty-three. I have a lot of room. Yes, I can see evolving. There was a kid—from not Kevin's group, but I guess from the Legal Aid defenders' group—who threw my words back at me when I said at some point early in my career that we're as bad as those who kill. I no longer hold that position.

Ms. Uelmen: I have a question. What struck me as you were both setting out your overview are the similarities

in your views, and how on one hand Kevin's view could be stated also without the Catholic support. I mean there are plenty of arguments against racism and the practical concerns that are also expressed in Church teaching, but don't necessarily have to be articulated in that way; and, vice versa, in that it's not necessarily a bad thing from a religiously informed perspective to be deep background to one's pragmatic approach to the practice of law.

So my question for you, District Attorney Hynes, is whether it bothers you that someone would be more explicit about the religious support for their political perspective?

And for Mr. Doyle, my question is whether it wouldn't make sense to try and be a little more implicit for the sake of public argument in terms of how much you bring in your Catholic perspectives, and whether just to try to articulate them in a way which is not so heavily laden with religious support and imagery?

Mr. Hynes: Amy, forgive me for revealing my limitations. I didn't understand the first question.

Ms. Uelmen: The first question is: you're very similar in your opposition to the death penalty and the way you've articulated what are the specific, practical reasons. The difference between the two of you is that Kevin uses the religious support and imagery as a foundation for his argument, whereas you don't use that as the basis. So does it bother you that he's explicit?

Mr. Hynes: No, not any more than we seem to have different views, because I'm a recovering defense lawyer too. I'm not nearly as troubled as Kevin is by some of the clients he has represented. No, not at all, because I'm not troubled, in particular, because I don't think the Church has spoken with a clear, authoritative voice. Again, I raise the question, "Why hasn't it?"

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Ms. Uelmen: And, Kevin, for you the question is: why not just make the leap and talk in more secular terms, just for the sake of the conversation?

Mr. Doyle: My answer is three-fold. One, I'm not here as a capital defender. I was invited for that reason, but I'm just speaking to you as a Roman Catholic who has been doing capital defense work for a long time. As a capital defender, not only do I not have a Catholic position against the death penalty, I don't even have a position against the death penalty as a matter of policy. Our office is a right-to-counsel office. As Art Cody said, it's not a think-tank, it's not an ethics institute, it's not a seminary. So that's my first response.

My second response is that I think the truths that I am talking about—I don't mean to say sound theologically chauvinistic, but I think there's a lot more sophistication in the appreciation of human nature in the Catholic tradition than in the Protestant tradition, for instance. I mean when I was in the South, I had friends who really thought, "Man, you are a shoe-in for Heaven," or "you are bound to go to Hell," where things were very black and white. I think Catholics have a much—if you read Graham Greene or Flannery O'Connor or Mary Gordon or people like that, or the spiritual works of Ignatius Loyola or Thomas Merton—I think there is a much more sophisticated grasp of human fallibility and complexity, and I think those things play in. I also think that—look, for better or for worse, for all its sexism and shortfalls, the Church is clearly the voice on the sanctity of human life today. I genuinely believe that.

My third response is that I am for the most part liberal myself, but I have to say one of the great liberal intellectual scams of the past fifty years is to make people who are religious think that their religious starting points are any less valid than the secular starting points of their neighbors. I mean if a person can get up and speak from their Freudian or Jungian, Millsian or

laissez-faire lens, or whatever, perspectives—how in the name of goodness would someone who happens to be Roman Catholic, or who doesn't happen to be, who chooses to be Roman Catholic—why should I be hindered? I think there is a fundamental misunderstanding about the separation of church and state. It's not a separation of religious morality and policy. I hope I have answered you fully.

Mr. Cody: Up front?

Question: I'm a little confused because I'm under the impression that Christ did have a point of view on the death penalty. In fact, he embraced it at his own execution. Without it, we wouldn't have the Catholic Church; he wouldn't have been able to carry his message of forgiveness. So it's a paradox, but it seems that he knew it had to be that way. Without it, we wouldn't have Catholicism.

Mr. Doyle: Well, of course, that argument would mean what Christ was really endorsing was the execution of the innocent. I'm not willing to follow that logic—do you work for Mel Gibson?

Mr. Cody: District Attorney Hynes, do you want to comment on that?

Mr. Hynes: No.

Mr. Cody: Next question?

Question: I have two questions. For the District Attorney—what if, as in some other cases in the United States, the Pope did present a position and conveyed that position to New York State or to you specifically? You know, if people petitioned the Pope and then the Pope responded by saying, "Yes, I think that." I think he has done that in other cases. What if he did that? Would that put you in an untenable position? How would you handle that?

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And then my question for Mr. Doyle is—I think as a young lawyer, my sense as a young lawyer is that you don't always choose your first job by philosophy, but by the job that you get, the job that you interview for and they give you. Can you imagine a situation for yourself—envision that your life might have taken a different route, and instead of going from Legal Aid to Wall Street and getting that first pro bono case, that you could have ended up in Mr. Hynes' position and reconciled your feelings as a Roman Catholic with the decisions you would have to make under the current law?

Mr. Cody: District Attorney Hynes?

Mr. Hynes: In terms of commuting the death penalty, I don't have the authority on that.

Questioner: But if he asked you not to pursue it.

Mr. Hynes: Well, if he asked me not to pursue it—well, first, it would be a kick talking to him. I would say, "Now listen, Holy Father, why don't you say what you mean?" And then he'd excommunicate me and that would be the end of the discussion. No, I wouldn't be persuaded unless he was very clear.

Mr. Doyle: Actually, my Dad was a police officer, and one of my heroes is my uncle who was an organized crime prosecutor growing up. So it's perfectly conceivable in a different universe that I would have ended up, certainly not as the illustrious elected District Attorney of Kings County, but as a prosecutor.

Mr. Hynes: I'm happy to hear that.

Mr. Doyle: I often see God's grace in not putting me on that path, because I sometimes fear that I would have been a hellaciously ruthless prosecutor—not merciless finally, but at times I think I would have been tempted to bend the rules unto breaking to get the bad guy. However, I don't think I would have been tempted ever to seek the death penalty. I think Denis Dillon in Nassau County says that he

considers the death penalty and he uses the test of absolute necessity, which by coincidence is the test that our Church tells us to use.⁵⁸ I'd keep an eye out for a case in which I didn't think we could incapacitate somebody short of seeking their execution. At least until that case came along, I would remain in good conscience and in office.

To go back to the recusal thing that came up before, not to be overly pragmatic, but keep in mind when you recuse yourself, if you recuse yourself because you're not bloodthirsty enough, the guy or the gal that they are going to put in after you is going to be plenty bloodthirsty. So there is a practical aspect of this.

Mr. Cody: In the rear?

Question: In one respect the panel seems sort of unbalanced, in that both of you say that your faith dictates your opposition to the death penalty. I was sort of hoping there would be a Catholic whose faith led him to support the death penalty here. In another respect, you are similar in a way that has been noted, in saying this is highly complex and so forth. But isn't it possible that the Holy Father's pronouncement is, as you said, District Attorney, *ex cathedra*? There is no Church doctrinal pronouncement on this, unlike abortion, where we all as faithful, loyal Catholics have an unwavering, absolute obligation to oppose the killing of the unborn?⁵⁹ It's a little more nuanced and complex with respect to convicted criminals.

⁵⁸ See Joe Feuerherd, *Paths Differ for Politicians Grappling with Faith's Demands*, NAT'L CATH. REP., May 23, 2003, available at http://www.findarticles.com/p/articles/mi_m1141/is_29_39/ai_102554561 ("I apply a standard in discerning whether to use that statute, which is not really in the law—the standard that has been set forth in [the March 1995 papal encyclical] *Evangelium Vitae* and also in the Pope's comments.") (quoting Denis Dillon) (alteration in original).

⁵⁹ See *EVANGELIUM VITAE*, *supra* note 19, ¶ 58 ("Among all the crimes which can be committed against life, procured abortion has characteristics making it particularly serious and deplorable. The Second Vatican Council defines abortion, together with infanticide, as an 'unspeakable crime.'") (quoting SECOND VATICAN

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Therefore, the Holy Father hasn't been stupid; he hasn't been lax. It's not a political matter. He has very judiciously and very carefully said, "This is a prudential matter that we should leave to the states and the various civil authorities to decide."⁶⁰ Therefore, in our country the test of absolute necessity has to be decided here. I wonder really whether absolute necessity is only the test of recidivism or retribution. I mean, isn't it possible that upholding the very sanctity of human life—that is the sanctity of the human life of the person who has been killed, in very prudential certain cases, and I'm not opining on whether we have done it right—but isn't it possible that upholding that very sanctity of human life would dictate that the death penalty is appropriate, just to uphold the sanctity of human life, not because of recidivism or because of retribution?

Mr. Cody: District Attorney Hynes?

Mr. Hynes: Well, my view of this is that there is nothing that supports any benefits to the death penalty. There is nothing that I've had in my experience as a lawyer all these years that has suggested to me that the death penalty has any positive things coming out of it. Yes, people will say, "Well, it deters that S.O.B. because he'll be dead." I guess that's the strongest argument that I hear. But it is never framed in that context. It's always framed in the context, "it's deterrence." It's not. I thought I made it pretty clear that the Catholic Church, given the current state of the record, does not influence my decision because it hasn't spoken with any clarity as far as I'm concerned. Kevin takes the opposite position, but that's my position.

COUNCIL, GAUDIUM ET SPES: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD ¶ 51 (1965).

⁶⁰ *See id.* ("[P]unishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity . . . [A]s a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.").

Mr. Doyle: Who here does not have access to the Net? Good. I beg you now—since I beg for people’s lives, this is easy—I beg you to look at the Catechism and see what it says. The Pope never uses the term “prudential judgment.”⁶¹ “Prudential judgment” is something Scalia uses.⁶² Scalia, who in his *Atkins* dissent, had no problem taking a cheap, gratuitous shot at the Church by noting our current troubles with the abuse scandals.⁶³ The “prudential judgment” is something Scalia injects. Or Avery Dulles, who again, I admire both him and his concerns for the stability in Church teaching, but he does not serve up Catholic teaching neat and straight.⁶⁴ And, by the way, he’s also a fabulous theologian but not a moral theologian. I beg you to get on the Net and look at what the Catechism says and see if there is any room for the notion that absolute necessity can be defined in terms other than incapacitation. I submit to you that a good-faith reading of what the Church teaching is—the only good-faith reading—is that currently we have reached the point where if we are able to incapacitate someone, then it is not morally right to execute them; that is not permissible.

Mr. Hynes: The joy of being a lawyer, because you hear from other lawyers—”that’s the only interpretation you

⁶¹ See, e.g., CATECHISM OF THE CATHOLIC CHURCH, *supra* note 2, ¶¶ 2266–67 (demonstrating that the Pope instead asserts that the death penalty should be used in cases where it is an “absolute necessity”).

⁶² See *Atkins v. Virginia*, 536 U.S. 304, 339–40 (2002) (Scalia, J., dissenting) (noting that the death penalty should be utilized because the Constitution allows for the execution of individuals subject to the “modern standards of decency” which are enacted by the country’s legislatures).

⁶³ See *id.* at 347 n.6.

The Court cites, for example, the views of the United States Catholic Conference, whose members are the active Catholic Bishops of the United States. The attitudes of that body regarding crime and punishment are so far from being representative, even of the views of Catholics, that they are currently the object of intense national (and entirely ecumenical) criticism. *Id.* (citation omitted).

⁶⁴ See, e.g., Avery Cardinal Dulles, *Catholicism & Capital Punishment*, FIRST THINGS, Apr. 2001, at 30 (commenting on the state of the capital punishment issue in Church teaching and contemporary Catholic theology, faith, and practice); see also *Avery Cardinal Dulles and His Critics*, *supra* note 23, at 7 (compiling various authors’ responses to Dulles’ article, *Catholicism and Capital Punishment*).

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can have.” I beg you to look at the Net, too, and I think you’ll come to a different conclusion than Kevin tells you.

Mr. Cody: I’m not sure if the Catechism was included as part of the materials.

Ms. Uelmen: Not everybody’s. I think for CLE purposes it’s included in the materials. If by chance you didn’t come for CLE but you’d like the packets anyway and we’re out, please leave me your business card and I’ll be happy to send it to you.

Mr. Cody: For those of you who have it and would like to take a look at it, I think the relevant section is 2267.

Mr. Doyle: Make sure you’re looking at the current one because, I think I alluded to this earlier, the first revision that was made in the Catechism was to strengthen the condemnation of the death penalty.⁶⁵ After *The Gospel of Life*⁶⁶—after that Encyclical, the Catechism even made clearer that we’re not to be executing individuals when we have the alternative of incapacitating them otherwise.⁶⁷

Question: Mr. Doyle, in listening to you and in thinking through this, with respect to the death penalty and

⁶⁵ Compare CATECHISM OF THE CATHOLIC CHURCH, *supra* note 2, ¶ 2267 (explaining that while the Catholic Church “does not exclude recourse to the death penalty,” and permits the death penalty in the rare case it is an “absolute necessity,” it prefers “non-lethal” means to protecting society and maintaining the aggressor’s dignity), with CATECHISM OF THE CATHOLIC CHURCH ¶ 2266 (1994) (referring only briefly to the death penalty as a means of punishment that can in some instances be “commensurate with the gravity of the crime”); see also Jeff Mirus, *Capital Punishment: Drawing the Line Between Doctrine and Opinion*, CATH. CULTURE, June 7, 2004, <http://www.catholicculture.org/highlights/highlights.cfm?ID=15>.

⁶⁶ See *EVANGELIUM VITAE*, *supra* note 19, ¶ 9. The relevant section states, in part, that “[n]ot even a murderer loses his personal dignity, and God himself pledges to guarantee this.” *Id.* Illustrating the concept of punishment as incapacitation rather than retribution, Pope John Paul II quoted from Cain and Abel, “‘God, who preferred the correction rather than the death of a sinner, did not desire that a homicide be punished by the exaction of another act of homicide.’” *Id.*

⁶⁷ See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 2, ¶ 2267 (stating that the Church prefers non-lethal means to punishing the aggressor, as they are “more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person”).

the absolute necessity and the ability to incapacitate, you would, I take it, approve of the death penalty in connection with a political or government leader whose presence in jail for a lifetime would probably not stop whatever political movement it was that was causing a problem. That was the implication of what you were saying.

Mr. Doyle: Right. I think that's a great question. One of the hypotheticals I think of as to what circumstances I could imagine execution being appropriate would be if Hitler had survived and gone to South America—and just merely the fact of him being alive, whether that in and of itself sort of gave energy and hope to those sick people. Of course, the counter thing you have to worry about is: are you creating some kind of a martyr.

Questioner: I understand that. But that is the context? You said it sort of generally. I wasn't sure whether that's really what you were meaning by the inability to incapacitate.

Mr. Doyle: Well, the other situation is if you're in a setting where there's no societal order. I mean in Somalia a few years ago, I don't know, but my sense is you were not in a position if you had a murderer to really be assured that you were going to be able to put him away forever. I was going to say so you might have to whack him, which sounds terrible, but you might have to take that person's life.

Mr. Cody: We'll take a question in the back.

Question: Yes. I have a question. This is for Mr. Doyle. If you say all life is sacred, but yet you won't indicate that a killer should be killed, then in essence you're saying that the killer's life is more sacred than the person or persons whom he killed, because the victims are subject to someone else's decision on whether or not they deserve life, but the killer should not be subject to someone else's decision on whether they deserve life. How do you reconcile that?

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Mr. Doyle: Let me come back for a second to something I said. I am a cop's son. If in one of the cases Mr. Hynes has prosecuted capitally—if instead of the capital murder occurring, a police officer had come on the scene and put a bullet right here [indicating the forehead] for one of our would-be clients, I wouldn't be happy that a life was lost, but I'd be relieved that the guilty guy died and not the innocent person. Unfortunately, executing someone, no matter how clearly guilty they are, no matter how heinous their crime, executing them is not going to bring back the victim, number one.

And, number two, I think it is part of our society's current Sally Jesse Raphael-afternoon-TV-B.S.-catharsis ethic of the current society to think that this is going to be something which brings healing to the victim's family. I think that is a cruel, cruel false hope. And it's one of the many things—due to the constraints of time, I mean, we just skim the surface as to all the problems with the death penalty. But I think that's one of the crueler aspects of the death penalty, the notion that somehow that is going to make people feel better or set things right.

Questioner: Well, I think a lot of victims' families would disagree.

Mr. Cody: Over there?

Question: This question is for Mr. Doyle. I want to come back to the communion issue. How should Catholic public officials who represent populations including non-Catholics deal with some of the Archbishop's threats to refuse communion for those who support views inconsistent with the Church?⁶⁸

⁶⁸ See Patricia Rice, *Archbishop Burke Says He Would Refuse Communion to Kerry*, ST. LOUIS POST-DISPATCH, Jan. 31, 2004, at 24; see also UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CATHOLICS IN POLITICAL LIFE (2004), available at <http://www.usccb.org/bishops/catholicsinpoliticallife.shtml> (stating that the "polarizing tendencies of election-year politics" can lead to situations in which Catholic teaching can be abused for political purposes). In fact, according to a survey

Mr. Doyle: I think three things. I think, first of all, everybody owes it to their fellow citizens and to the Church to put things in perspective. It has been a handful of bishops and archbishops who have done that. That's the first thing.

The second thing is I think—and I was quoted in *The Times* saying this—it borders on scandal that even these few bishops seem to only single out Democrats, not Republicans.⁶⁹ In fact, St. Vincent's, which is in Manhattan—a great hospital, but it's controlled from the Brooklyn Diocese—is about to have a wing named after Rudolph Giuliani, who's a double-death Republican.⁷⁰ He's Pro Choice on abortion and he thinks execution is the best thing since sliced bread.

So I think those two things. And then, lastly, I think that public officials, if they are going to hold themselves out as Catholics, have to be attentive to the teaching of the Church. And I think that there comes a point—and this certainly is not addressed to my co-panelist at all; I have in mind completely other people. There comes a point when people have so diverged from the Church on crucial issues that I, well, I certainly wouldn't hope anybody would refuse them communion, for a variety of reasons. But here's what I think the bishops should do—and of course, the bishops, because so many of them have so mishandled our child abuse scandal, and I don't mean to

by Catholics for a Free Choice, four bishops have said they would deny communion to politicians who support access to abortion; seventeen have urged them to avoid taking the sacrament; and 138 said they would not readily impose such a sanction. See Daniel J. Wakin, *A Divisive Issue for Catholics: Bishops, Politicians and Communion*, N.Y. TIMES, May 31, 2004, at A12.

⁶⁹ See Wakin, *supra* note 68, at A1 (“It is jarring to hear a small minority of bishops single out Democratic politicians for their pro-choice thinking and seemingly not singling out Republican pro-choice Catholics, or pro-death-penalty Catholics of any stripe.”) (quoting Kevin Doyle).

⁷⁰ See Dennis Duggan & Pete Bowles, *Emergency Is His Name; Hospital Honoring Giuliani*, NEWSDAY (N.Y.), Aug. 13, 2002, at A4 (reporting that the nearest trauma center to the World Trade Center, St. Vincent's Hospital, is naming its renovated emergency department after former Mayor Rudy Giuliani for all his support during the rescue efforts of September 11, 2001).

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exaggerate that, but obviously, I speak as a father of three kids, it's a horrible thing and I think the bishop's moral authority has been worn down. But here's what I think they should do—I think they should simply say to Catholic officials who fundamentally depart from Church teaching, "You're welcome at communion, you're welcome to Mass anytime you want, you're part of the flock. But when you're running for office don't use your Catholicism as an ethnic credential or some fodder."

There's a district attorney in upstate New York who is an avid, avid capital prosecutor, to the point in my view that, even if I favored the death penalty, I would think he has been reckless fiscally, his legal judgments have been poor, and he just says anything that comes to his mind when discussing the death penalty. You go to his campaign Web site and you would think that the guy is going to be our next Pope, because every Catholic credential, every time he has carried the collection basket, his trusteeship—blah, blah, blah—is there on his Web site. I think Catholics should just be asked—and if they don't want to do it, fine—but they should be asked that if they are going to depart that fundamentally from Church teaching, then they should just not use their Catholicism because it does confuse people. They should not use their Catholicism as campaign fodder.

Question: The Court of Appeals has set off a great debate among our moral theologians in Albany. The issue is there are basically three men that control the judgments of politics and law in New York State. To turn it around, how do we influence them at this point? Knowing the objections that seem to be pretty obvious, and the inadequacies that seem to be pretty obvious, how do we address those objections and inadequacies to this troika of deep thinkers?

Mr. Hynes: As an advocate for the restoration or abolition?

Questioner: Abolition.

Mr. Hynes: Well, wearing another hat, I've been very, very active in trying to get support to repeal the Constitution with respect to the Constitution Convention for selection of State Supreme Court judges.⁷¹ It is a sham. It denies voters the right to vote. I'm part of a coalition of people, including various diverse groups of businesspeople and lawyers. I've gotten the State Senate Majority Leader to the point where he agrees we should have public hearings on the issue and talk about the various alternatives. The Assembly has also given at least preliminary okay. The problem with the abolitionists in this state is there is no coordination. That's the thing that bothered me with the election with Cuomo and Pataki. I mean good, decent people who believe fundamentally the death penalty is wrong never said a word. Now, maybe it's because they didn't like Mario. I don't know. I don't know what the reason was. There were signs certainly all over the upstate area, "Time's Up, Mario." Did that motivate them?

I know in 1998—and I hesitate reminding anybody, because I thought some of my family would be here—when I had my last flight of fancy and ran for Governor, I was the only one who said forthrightly, "I will lead a movement to abolish the death penalty." Well, you would think that I had said that in some cavity or the middle of a forest. I had no support from all these folks who you hear today all over this state saying, "Let's abolish it." There has to be a coordination of strategy. There has to be a demand for public hearings, just as we're getting public hearings on the issue of constitutional revocation. There have to be public hearings so good and decent people of the entire

⁷¹ See Press Release, Charles J. Hynes, Dist. Attorney, Office of the Dist. Attorney, Kings County, Response to Brennan Center Lawsuit Filed in Eastern District to Reform Supreme Court Selection System in New York State (Mar. 18, 2004), available at http://www.brennancenter.org/programs/downloads/nys_judicial%20elections_hynes_statement.pdf.

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spectrum—because I don't reject for a moment people who honestly believe that the death penalty is something that is effective for reasons they believe. I'd like to see the debate publicly discussed, as we've done here at Fordham Law School. The problem is there is no coalition. There has to be a coalition.

Mr. Doyle: I think that one thing that should happen is there should be a fundamental focus on resource allocation. You can have a death penalty, like Texas', and then you can have a capital justice system which instead of inspiring respect for the law invites disrespect. You can have that. You can make mistakes and kill innocent people. Or you can try to do it right, as New York has.

But then the amount of resource—there's a tremendous amount of resources that go in on this side and on that side when the case is capitally tried, then appealed, and on and on. Those are dollars that are taken from other needs in the criminal justice system. The wisdom is that not the severity of punishment but the certainty of punishment is what deters, right? So, whatever we think philosophically or metaphysically about the death penalty, we have to think about diverting this money when it could be going to better police forensics, more police cars, drug treatment programs, and that kind of thing.

And what service are we doing victims' families when we divert money from real victims' services and instead conscript families into what are cruel charades? I'm still reflecting on the comment from the questioner up there. It recalls to mind one of the worst things I've seen here in my job here in New York. I mentioned earlier that I worked with the Fordham alumnus Rob Aiello on a case outside the City. There was a point in the case. This was a horrible, horrible case in which a young man was very drunk, his girlfriend was very drunk, and they had had a terrible, terrible—I mean "dysfunctional" is almost a foolish word to use to describe their relationship. In the early

hours of the morning, he ended up stabbing her and her children. The sadness of the case is something I'll never shake.

This kid, which is what he was, knew what he had done and felt the full horror of having killed these children, particularly the children. At one point in the trial, after some testimony, he just broke down, wailing, crying, and the crying continued. You could see, if you were this close to him, which the prosecutor was, it was genuine, and it continued when he went back and there would be no benefit in show crying for anyone. But the prosecutor went to the family of the victim and said, "Crocodile tears." The point was that it was important for the prosecution to keep that family raw in its woundedness [sic]. It was important for that prosecutor to keep that family just seething with anger and without ever glancing at anything approaching contrition in that defendant. That is cruel, it's politics, it's showmanship, and it's not what serves victims' families.

Clearly, as a criminal justice system we have neglected victims for too long—not just the families of murder victims, but all kinds of victims. But now that we're finally getting a better perspective, we should wonder whether we want to be spending tens of millions of dollars on a death penalty, which divides us and really serves no practical purpose, rather than making for better deterrence and serving victims and making a stronger, more moral criminal justice system overall.

Mr. Cody: We have time for perhaps one more question. Let's take the gentleman in the aqua shirt on the far left-hand side.

Question: I'm not a lawyer.

Mr. Cody: God bless you, sir.

Questioner: But I do share your Catholicism. I have this question. It's a question about the Pope and about

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Vatican Council II. As the Church has progressed and changed, it seems that the bishops of the countries have become more and more active since Vatican Council II. I know the Pope is infallible, but I hope that everyone here also knows that the last general council of the Catholic Church is the council in power, for want of a better word, or the council holding. It's very definite that Vatican Council II has brought the bishops forward. More meetings, for example, it's a very common thing in various countries for bishops to have their own meetings.

I'll cut to the chase because I know it's the end. What if—if I may allow, I don't know if this is a good legal question—what if the bishops of the United States gathered together and very clearly came out with a statement that capital punishment is wrong? And what if the Pope didn't come vaulting into the arena and say anything? Would the D.A.—would the law enforcement of our country, go along with the United States bishops' statement?

Mr. Hynes: You know, you asked the wrong guy. I'm not a great fan of the American bishops, and I'll tell you why. I've had active prosecutions of assaults on children by priests. Only one bishop—and he has taken a lot of criticism—only one bishop in this country had the courage to sign a memorandum of understanding with me as the chief prosecutor that in the future any violation of a child will be brought to my attention immediately.⁷² The bishops have done nothing but try to skirt the issue. That doesn't come from me. It comes from a

⁷² See Press Release, Office of the Dist. Attorney, Kings County, Kings County District Attorney Charles J. Hynes and Bishop Thomas V. Daily Sign Memorandum of Understanding (Apr. 29, 2002), available at http://www.brooklynda.org/News/press_releases%202002.htm#012. In 2002, Bishop Thomas V. Daily of the Diocese of Brooklyn and Queens signed a "Memorandum of Understanding" with Kings County District Attorney Charles J. Hynes in which the Diocese agrees to immediately report to the District Attorney's Office all allegations of sexual abuse of minor children by priests. The document gives an overview of the process by which a report will be forwarded "without prior screening regarding the truth of the allegations." *Id.*

guy who is polar opposite, Bill Bennett, who is also a very, very solid Catholic. He has discussed it with them. So I'd have difficulty listening to anything they said.

Mr. Cody: Perhaps one more question.

Questioner: Do you have anything to say, Sir, as a comment on my question?

Mr. Doyle: Well, look, I'm not inclined to conflate the moral authority of Church leaders with the fact that they may have made jackasses of themselves in one area, number one. I think if you do that, frankly, I don't know how you remain Catholic, looking over our 2,000-year history.

Mr. Hynes: We have great monsignors, too.

Mr. Doyle: We have had some wild ones—I don't know. The bosses of those monsignors—we've had some characters.

Mr. Hynes: That's true.

Mr. Doyle: So I'm not inclined to take that analysis. As a practical matter, frankly, I don't think it would make a big difference.

Questioner: I belong to a group called Voice of the Faithful, so I joyfully accept everything you've just said. But, Mr. Hynes, it seems like the Church in its changes requires the Pope to come galloping into the arena when something important is going on. A case in point might be that I understand some countries are against capital punishment and some countries aren't. Am I right in that?

Mr. Hynes: Yes, absolutely.

Questioner: All right. So why couldn't the United States?

Mr. Hynes: I think that the first point I want to say to you is keep up the work because you'll make the change—the Voice of the Faithful. I see no problem. I don't

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believe I conflate, whatever that word means, the bishops by taking them on in a fundamental way.

Mr. Doyle: You went to St. John's, I forgot, not Fordham.

Mr. Hynes: I'm a Vincentian. I just think the bishops came to an appalling decision on that issue. Could they be right on the death penalty? Sure. But they don't speak with the moral authority of my Church. Only the Pope does.

Mr. Cody: I think that's going to conclude our evening. I'll turn the microphone back to Amy Uelmen.

Ms. Uelmen: Thank you, Art and both of you, for a fantastic discussion.