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# DEATH'S CASUISTRY

ROBERT W. TUTTLE\*

In *Catholic Judges in Capital Cases*,<sup>2</sup> John Garvey and Amy Coney offer a rare example of legal scholarship as a pastoral activity. Although their essay bears all the marks of academic prose, including close analysis of authoritative sources and well-supported practical judgments, its underlying passion falls into the traditional category of the "care of souls." The souls at issue for Garvey and Coney are "orthodox" Roman Catholics in the federal judiciary, and the death penalty provides the occasion for pastoral care. For orthodox Roman Catholics, the death penalty raises a moral conflict: faithfulness to Church teaching would seem to forbid participation in cases that involve the death penalty, while fidelity to the judge's professional role would seem to require a suspension of that "private belief" and an evenhanded administration of the criminal law, including administration of the death penalty.

Garvey and Coney approach their pastoral task through a sophisticated moral casuistry, a method particularly appropriate for this conference's setting at a Jesuit university.<sup>3</sup> The authors present four "cases of conscience," situations in which federal judges confront the death penalty. In the first, the judge presides over the guilt phase of a criminal case in which prosecutors seek the death penalty, but not over the sentencing phase. The authors find a Catholic judge's participation in this case to be morally permissible because fair trials further the basic good of justice and because the act of convicting a defendant is morally distinguishable from the act of sentencing.<sup>4</sup> In the second case, an appellate judge (or Supreme Court Justice) is asked to review a capital conviction or sentence. This case involves somewhat greater cooperation in

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2. John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998).

3. For general descriptions of casuistry, see ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* 42-46, 250-63 (1988); RICHARD MILLER, *CASUISTRY AND MODERN ETHICS: A POETICS OF PRACTICAL REASONING* 4-5 (1996); Keenon & Shannon, *Contexts of Casuistry: Historical and Contemporary*, in *THE CONTEXT OF CASUISTRY* 221, 221-26 (1995).

4. Garvey & Coney, *supra* note 1, at 324-26 122-24.

the machinery of the death penalty, and so the authors regard it as inherently ambiguous: it is neither intrinsically permissible nor impermissible. Judgment depends on the particularities of each case.<sup>4</sup> The authors find participation in the last two cases, however, to be intrinsically blameworthy: a Catholic judge cannot in good conscience either impose a jury's sentence of death or decide a defendant's sentence where prosecutors have sought the death penalty. The authors find this to be so even if the judge antecedently intends to sentence the defendant to imprisonment rather than death.<sup>5</sup>

I am persuaded by Garvey's and Coney's arguments in all but the last situation, that in which a defendant elects to have the sentencing phase tried before a judge sitting without a jury. This might appear to be an odd choice of a place to disagree. After all, this case involves the judge in the death sentence to a greater degree than a judge who merely imposes a verdict reached by the jury, and to a much greater degree than an appellate judge who passes on the sufficiency of a lower court judgment. An argument about the judge who both decides and imposes the death sentence involves none of the complex moral questions of material cooperation in evil, i.e., about those who lack the intention of wrongdoing but nonetheless perform acts that help to bring about the wrong.<sup>6</sup> Even the judge who imposes the jury's sentence might plausibly claim to be only a material participant—Garvey and Coney reject such a claim, but St. Thomas Aquinas can be cited in its defense—but the judge who decides and imposes the death penalty stands second only to the executioner as a formal participant in the act.<sup>7</sup> Indeed, the judge's cooperation gives the execution its moral character. Without her judgment, the execution ceases to be an expression of the state's justice and becomes no more than private vengeance—or murder. Nonetheless, I contend that an orthodox Roman Catholic may determine the sentence of a capital defendant without sinning against conscience or violating her professional obligations as a judge.

This contention is, of course, paradoxical. My reading of the authorities would permit the judge to participate in circumstances that entail clear formal participation (i.e., determining the sentence) but would forbid participation in circumstances where her formal coopera-

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4. *Id.* at 326-31.

5. *Id.* at 321-24.

6. *Id.* at 317-19 (on formal and material cooperation in evil).

7. Garvey & Coney, *supra* note 1, at 321-22; ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, II-II 67.2 (Fathers of the American Dominican Province trans., 1948)..

tion in the act is more attenuated. To understand this paradox, we need to return to the Church's teachings, usefully summarized by Garvey and Coney. Three sources are of special importance: Pope John Paul II's 1995 encyclical *Evangelium Vitae*, the Catechism of the Catholic Church, and the 1980 Statement on Capital Punishment by the (U.S.) National Conference of Catholic Bishops. Each of these documents starts with a strong affirmation of the inviolability of human life. In the words of *Evangelium Vitae*, human life is "a *sacred reality* entrusted to us, to be preserved with a sense of responsibility and brought to perfection in love and in the gift of ourselves to God and to our brothers and sisters."<sup>8</sup>

In some situations, such as procured abortion, the affirmation of inviolability translates into an absolute rule against the practice. In other cases, the affirmation of inviolability entails only a strong presumption against direct assault on life. Warfare and capital punishment fall into the latter category of practices that require justification, but are not intrinsically wrongful.<sup>9</sup> The Church documents, however, make clear that several arguments typically used to justify capital punishment are not available to Catholics. First, while the desire for retribution is understandable, it contradicts Christ's counsel to forgive the sinner and God's actions in preserving Cain even after Abel's murder.<sup>10</sup> The infliction of injury for its own sake cannot be a proper exercise of state power.<sup>11</sup> Second, reform of the criminal is a proper object of punishment. Indeed, as the Catechism suggests, "when [] punishment is voluntarily accepted by the offender, it takes on the value of expiation."<sup>12</sup> But the death penalty defeats any transformative purpose in punishment: the death penalty "necessarily deprives the criminal of the opportunity to develop a new way of life."<sup>13</sup> Nor is expiation a theologically acceptable

8. JOHN PAUL II, THE GOSPEL OF LIFE: *EVANGELIUM VITAE* ¶ 2 (1995) [hereinafter *EVANGELIUM VITAE*].

9. Garvey & Coney, *supra* note 1, at 306-07; *EVANGELIUM VITAE* ¶¶ 55-56; NATIONAL CONFERENCE OF CATHOLIC BISHOPS, STATEMENT ON CAPITAL PUNISHMENT ¶ 4 (1980) [hereinafter *BISHOPS' STATEMENT*].

10. *EVANGELIUM VITAE*, *supra* note 8, ¶9.(on the mark of Cain); *BISHOPS' STATEMENT*, *supra* note 9, ¶ 8 (on Christ's words of forbearance and forgiveness).

11. The Bishops cite Aquinas in defense of this point: "In this life, however, penalties are not sought for their own sake, because this is not the era of retribution; rather, they are meant to be corrective by being either conducive to the reform of the sinner or the good of society, which becomes more peaceful through the punishment of sinners." *AQUINAS, supra* note 7, at 68, 1 (1975).

12. *CATECHISM OF THE CATHOLIC CHURCH* ¶ 2266 (1994) [hereinafter *CATECHISM*].

13. *BISHOPS' STATEMENT, supra* note 9, ¶ 5.

defense of capital punishment. As Francesco Compagnoni explains, the criminal justice system cannot "make an expiation" by killing a prisoner. Instead, only the prisoner can freely make his expiation. "[H]e recognizes that he has separated himself from God, confesses his fault and turns back to God, confident of receiving his mercy."<sup>14</sup> It can hardly be argued that the death penalty is justified as a means for provoking repentance.<sup>15</sup>

The documents reject vengeance and reformation-expiation because of the tradition's moral logic, but seem to offer a different sort of objection to the third argument for the death penalty, general deterrence. As the Bishops write:

While it is certain that capital punishment prevents the individual from committing further crimes, it is far from certain that it actually prevents others from doing so. Empirical studies in this area have not given conclusive evidence that would justify the imposition of the death penalty on a few individuals as a means of preventing others from committing crimes. There are strong reasons to doubt that many crimes of violence are undertaken in a spirit of rational calculation which would be influenced by a remote threat of death.<sup>16</sup>

Here, the Bishops' argument has shifted from the logical to the practical. General deterrence fails as a defense of capital punishment because the practice does not reliably achieve the goal of reducing crime. While the distinction between the logical and the practical will be central to my argument, the Bishops' reliance on practical objections to generalized deterrence is superfluous. As Garvey and Coney recognize, general deterrence violates the tradition's moral logic no less than vengeance or reformation-expiation. "[T]he appeal to general deterrence is a claim that we should do evil that good may come of it, and that is an impermissible suggestion."<sup>17</sup> General deterrence may be a beneficial side-effect of an otherwise justified practice of capital punishment, but standing alone it amounts to nothing other than pure consequentialism: by killing this one person other lives may be saved.

14. Francesco Compagnoni, *Capital Punishment and Torture in the Tradition of the Catholic Church*, in *THE DEATH PENALTY AND TORTURE* 39, 51 (Franz Böckle and Jacques Pohier eds., 1979).

15. BISHOPS' STATEMENT *supra* note ¶ 5 ("It may be granted that the imminence of capital punishment may induce repentance in the criminal, but we should certainly not think that this threat is somehow necessary for God's grace to touch and to transform human hearts.").

16. *Id.* ¶ 6.

17. Garvey & Coney, *supra* note 1, at 309.

Unlike general deterrence, the fourth argument for capital punishment—incapacitation of the offender in order to protect society—does not violate the tradition's moral logic; indeed the claim that the offender should be incapacitated falls squarely within the tradition's best-developed justification for the use of lethal force, the "just war" doctrine.<sup>18</sup> The most relevant aspects of just war teaching for the present inquiry are the two requirements of *jus in bello* (just conduct in warfare): non-combatant immunity and proportionality.<sup>19</sup> Non-combatant immunity, as the name suggests, delimits the direct objects of combatants' violence. Those who fall outside the class of combatants, as defined by various international treaties and practices, may not be targeted intentionally (though harm to non-combatants may be an unintended consequence of legitimate targeting of combatants).<sup>20</sup> Infants and the infirm are clearly members of the class of non-combatants, but so are combatants who have become incapacitated. Wounded or captured soldiers may not be direct objects of attack; nor may sailors or airmen stranded at sea after their boats or planes have been destroyed.<sup>21</sup> The analogy to capital punishment is readily apparent: if the offender is effectively incapacitated by imprisonment, then the offender no longer poses a threat to society and thus ceases to be a legitimate object of the state's violence.

Proportionality, the second requirement of *jus in bello*, places an additional restraint on the legitimate use of force. Even if the intended object of an attack is legitimate, the attack still may be unjust if its overall costs outweigh the benefits achieved by the attack.<sup>22</sup> For example, a small military installation located in an urban center may be a proper target of a bombing raid (thus meeting the requirement of non-combatant immunity), but the indirect harm inflicted on civilians living around the installation, "collateral damage," must be weighed against the benefit achieved by destroying the military installation. One can draw two different analogies to capital punishment from the principle of

18. CATECHISM OF THE CATHOLIC CHURCH makes explicit the analogy between capital punishment and just war teaching. See CATECHISM, *supra* note 12, ¶ 2266.

19. For a general description of these requirements, see NATIONAL CONFERENCE OF CATHOLIC BISHOPS, THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE ¶¶ 101-10 (1983) [hereinafter THE CHALLENGE OF PEACE].

20. *Id.* ¶ 104. See also RICHARD B. MILLER, INTERPRETATIONS OF CONFLICT: ETHICS, PACIFISM, AND THE JUST-WAR TRADITION 14-15 (1991).

21. See MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS, 138-59 (1977).

22. THE CHALLENGE OF PEACE, *supra* note 19, ¶¶ 105-06.

proportionality. First, since the use of force must be proportionate to the benefits to be achieved, the state must use no greater force than necessary to achieve its ends. Thus, if non-lethal means effectively incapacitate the offender, then lethal means are disproportionate and therefore unjust. Here, of course, proportionality closely parallels the principle of non-combatant immunity.

The second analogy is broader. Even if the offender is a legitimate object of lethal force (i.e., she is not effectively incapacitated by imprisonment), the exercise of force still may be disproportionate if indirect harms outweigh the benefits achieved by incapacitating the offender. Given the usual context of proportionality questions—bombing and other instruments of mass destruction—this may seem a strained analogy to capital punishment. We assume that the state will use precise means of execution, minimizing the risks of direct harm to anyone but the offender. But the practice of capital punishment can still carry the risks of indirect harms, such as the possibility that innocents will be wrongfully convicted and executed.

Using the *jus in bello* analogy, the Church documents affirm the state's rightful concern with protecting the community, but deny that the practice of capital punishment meets the requirements of discrimination (non-combatant immunity) or proportionality. The analogy is clearest in the Catechism: "If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person."<sup>23</sup> No greater force should be applied against the offender than is necessary to achieve society's ends, and the documents reach a uniform conclusion about the proper extent of that force. Pope John Paul II states it most forcefully in *Evangelium Vitae* although the state has legitimate interests in punishing offenders,

*the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not to go to the extreme of executing the offender except in cases of absolute necessity: 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*

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23. CATECHISM, *supra* note 12, ¶ 2267 (also quoted in *EVANGELIUM VITAE*, *supra* note 8, ¶ 56). See also BISHOPS' STATEMENT, *supra* note 9, ¶ 10 ("We should feel such confidence in our civic order that we use no more force against those who violate it than is actually required.").

not practically non-existent.<sup>24</sup>

Imprisonment, the Pope contends, effectively incapacitates offenders, rendering capital punishment a violation of both the principles of discrimination and proportionality.

The US Catholic Bishops' statement develops an even more expansive account of capital punishment's disproportionate costs. In addition to the physical harm inflicted on the offender, the Bishops list four other sorts of "collateral damage" caused by the death penalty. First, execution cuts the offender off from the possibility of moral reform, from the chance for "moral growth in a human life which has been seriously deformed."<sup>25</sup> Second, execution brings great anguish not only to the offender, but also to the offender's family and witnesses to the event.<sup>26</sup> Third, the death penalty exacerbates pre-existing inequities in the criminal justice system, especially those based on race and class.<sup>27</sup> And fourth, the death penalty contributes to a general societal disregard for the value of life—contributing to a "culture of death."<sup>28</sup>

These arguments based on the *jus in bello* analogy form the core of the Church's opposition to capital punishment, but they differ in kind from arguments that are rooted in the tradition's moral logic—the arguments that establish procured abortion and euthanasia as intrinsically wrongful acts. Prudential grounds alone provide the documents' reasons for rejecting the societal defense justification for capital punishment. Recall the Pope's words: justifiable cases of capital punishment "are very rare, if not practically non-existent."<sup>29</sup> Though the Church documents express grave reservations, capital punishment remains, in principle, a permissible option for public authorities. The class of justifiable cases is formally open, even if "practically non-existent."<sup>30</sup> At this point, my analysis no doubt recalls the worst caricatures of moral casuistry, the type ridiculed by Pascal, the type made a pejorative for hair-splitting, irrelevant distinctions in the service of moral laxism.<sup>31</sup> The fi-

24. EVANGELIUM VITAE, *supra* note 8, ¶ 56 (emphasis in original). See also BISHOPS' STATEMENT, *supra* note 9, ¶ 7.

25. BISHOPS' STATEMENT ¶ 16.

26. *Id.* ¶ 19.

27. *Id.* ¶ 21.

28. *Id.* ¶¶ 14, 20. See also EVANGELIUM VITAE ¶ 4; JOHN PAUL II, CHRISTIFIDELES LAICI: ON THE VOCATION AND THE MISSION OF THE LAY FAITHFUL IN THE CHURCH AND IN THE WORLD ¶ 38 (1988).

29. EVANGELIUM VITAE, *supra* note 8, ¶ 56.

30. *Id.* ¶ 55; CATECHISM, *supra* note 12, ¶ 2266.

31. See JONSEN & TOULMIN, *supra* note 2, at 231-49 (on Pascal's critique of casuistry);



nal judgment, of course, belongs to the reader, but I have different purposes in mind: I turn now to the first of these purposes, and leave the second for the conclusion of my response.

The distinction between arguments rooted in the tradition's moral logic and those based on prudential judgments goes to the proper relationship between the Church's teaching authority and the "lay apostolate." To the former, the faithful are called to hear and obey, striving conscientiously to apply the moral norms in their lives.<sup>32</sup> With judgments of prudence, however, the laity are more than passive receptors—they participate actively in discerning and articulating the moral order. A strong suggestion of the laity's complementary role comes in one of the most important documents of the Second Vatican Council, *Gaudium et Spes*.

Laymen should also know that it is generally the function of their well-formed Christian conscience to see that the divine law is inscribed in the life of the earthly city. From priests they may look for spiritual light and nourishment. Let the layman not imagine that his pastors are always such experts, that to every problem which arises, however complicated, they can readily give him a concrete solution or even that such is their mission. Rather, enlightened by Christian wisdom and giving close attention to the teaching authority of the Church, let the layman take on his own distinctive role.<sup>33</sup>

This "distinctive role" should not be restricted to difficult technical and scientific questions—as Garvey and Coney note, the Church has a spotty track record in its astronomy<sup>34</sup>—but also should extend to moral questions that require an immersion in what casuists call the "circumstances" of the case.<sup>35</sup> Teachers and pastors in the Church, along with the experts they consult, can draw some parameters around the meaning of "effective incapacitation," but the ultimate determination should rest with those who have been entrusted by society with its pro-

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JOHN MAHONEY, *THE MAKING OF MORAL THEOLOGY: A STUDY OF THE ROMAN CATHOLIC TRADITION 135-43* (1987) (on probabilism and moral laxism). Garvey and Coney have a similar reaction to the type of arguments I am offering here: such arguments have an "air of evasion" about them. See Garvey & Coney, *supra* note 1, at 317.

32. See John XXIII, *Mater et Magistra* ¶¶ 226-41, in *THE SOCIAL DOCTRINE OF THE CATHOLIC CHURCH*, 205, 273-76 (1964).

33. SECOND VATICAN COUNCIL, *GAUDIUM ET SPES: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD* ¶ 43 (1965).

34. Garvey & Coney, *supra* note 1, at 314.

35. See JONSEN & TOULMIN, *supra* note 2, at 131-36; Keenan & Shannon, *supra* note 2, at 223-24.

tection.

I recognize that this argument can be construed as situation ethics in sheep's clothing: each judge should rule according to her own internal light.<sup>36</sup> But the first sentence in the preceding quotation from *Gaudium et Spes* should make clear a distinction. The faithful judge rules according to a "well-formed Christian conscience," not out of pure subjectivity. This formed conscience certainly should give "serious attention" to the Church's teaching on capital punishment; here I agree with Garvey and Coney. But we disagree about the consequence of this "serious attention." For Garvey and Coney, the Church's teaching on capital punishment preempts the judge's own exercise of prudence in cases involving the death penalty. The alternative, they argue, is for the judge to "set aside his conscience;" "the judge rejects his obligation to obey conscience and admits the possibility of acting contrary to right judgment."<sup>37</sup> This would only be true if the class of justifiable death sentences were formally closed, but it is not: where necessary for the safety of society, the death penalty may be imposed. Even if such cases are extremely rare, the judge need not suspend her "well-formed Christian conscience" in order to engage in the practical determination of whether a given case meets the criteria of extreme necessity.

As I noted at the start of this response, Garvey and Coney approach the question (among other reasons) as an exercise in pastoral care, and my discussion until now has slighted one whole dimension of that pastoral care: a concern for the judge's professional obligations. Indeed, the solution to the first question—may a faithful judge deliberate about imposing the death penalty—would seem to come at the expense of fidelity to the judge's vocation. Our judge cannot approach the act of sentencing with a truly "open mind" about the death penalty, indifferent between death and life, because the Church's teaching places a very strong presumption in favor of life.

If this were a matter of deciding rights between two parties, where a judge's strong presumption in favor of one party results in bias toward the other and effectively denies the other a fair hearing, then I would agree with Garvey and Coney that recusal is the faithful judge's only op-

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36. For both Catholic and Protestant ethics, situation ethics arose out of existentialism's stress on personal decision. Each situation represents a wholly unique ethical moment, and requires a spontaneous decision. Moral norms, because of their generality, are unfit for any service beyond that of "rules of thumb"—rough, but never determinative, guides to action. In 1952, and then again in 1956, Pope Pius XII condemned situation ethics as a denial of objective moral truth. See MAHONEY, *supra* note 31, at 202-10.

37. Garvey and Coney, *supra* note 1, at 323.

tion, short of resignation. Indeed, I can think of no other case in which the judge may have such a strong presumption in favor of one disposition and still not violate her professional duty. But the death penalty is unique in this regard: even if the government presents volumes of evidence on aggravating factors, showing that the defendant “merits” death under the statute, and the defendant produces absolutely no evidence of mitigating factors, the judge is always free—not just in fact, but under the law—to find life, rather than death.<sup>38</sup> As Garvey and Coney indicate, the statute affirms that “the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence[.]”<sup>39</sup> No chain of deductive logic—if A is proved then the judge must find B—can ever lead to a sentence of death.

Garvey and Coney recognize the discretion vested in the sentencing judge, but contend that the faithful judge’s predisposition to find life rather than death still violates her professional obligation: the judge “refuses to go through the process required to get there.”<sup>40</sup> But if the process required is, among other things, an assessment of the defendant’s continuing danger to the community, then the faithful judge does go through that reasoning process. One may object to this admittedly truncated deliberation; it seems unfair that offenders are sentenced to death before other judges when, except in the extremely rare—and perhaps only hypothetical—case, they would be given life sentences by our

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38. The difference between *de facto* and *de jure* discretion is important, because the judge’s strong presumption in favor of life does not operate as a “nullification” of the state’s case for death, but rather operates within the boundaries established by the statute and applicable constitutional precedents. The federal death penalty statutes, following Supreme Court precedents, predicate imposition of the death penalty on specific determination of aggravating and mitigating factors. Even if aggravating factors are determined to outweigh any mitigating factors, the judge or jury responsible for sentencing the defendant are not required to return a death sentence. See 18 U.S.C. § 3592(a) (Federal Death Penalty Act of 1994); 21 U.S.C. § 848(i)-(m). The Supreme Court has made the discretion to exercise mercy a constitutional prerequisite in capital cases. “It is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence.” *Gregg v. Georgia*, 428 U.S. 153, 189-90 n.38 (1976). A process that “excludes from consideration . . . the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind” violates basic conceptions of justice because it “treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). See also *Sumner v. Shurman*, 483 U.S. 66, 78-80 (1987) (holding unconstitutional a 1975 Nevada statute that mandated the death penalty for anyone convicted of murder where at least one aggravating factor was present).

39. 21 U.S.C. § 848(k) (1994) (quoted in Garvey & Coney, *supra* note 1, at 336).

40. Garvey & Coney, *supra* note 1, at 138.

faithful judge. A different judicial assignment would have saved their lives. But this apparent injustice is built into the discretionary structure of capital sentencing.<sup>41</sup> So long as no syllogism controls death sentences, this disparity will remain.

Having said all that, I must admit that an "air of evasion" still lingers. Why not accept the relatively simple solution offered by Garvey and Coney? Their position is morally sound; the judge's religious and vocational integrity are preserved by recusal. And even if one accepts my argument that Church teaching leaves open the (formal) possibility of justifiable death sentences, one would have very good reasons for supporting a prophylactic rule against entertaining the practical question of sentencing in capital cases. Such a rule would minimize the chances of judicial error (which might be compounded by inflamed passions in a particularly gruesome case); and, as the Bishops' statement suggests, an exceptionless rule would provide a strong witness to the "gospel of life."<sup>42</sup>

These concerns are valid, but not dispositive. If we are solely concerned with the consciences of judges, then Garvey and Coney's analysis is correct. But my casuistry has a second purpose; and for this I must return to the *jus in bello* analogy. The judge must not intentionally perform a wrongful act: if engaging in the practical question of capital sentencing were intrinsically wrong, I would hold that a faithful judge must refrain from the act. But it is not intrinsically wrong, so our analysis moves, analogically, to the question of proportionality. The costs of a faithful judge hearing such cases have both religious and political dimensions. The judge risks sinning against conscience by finding death in cases that do not represent "extreme necessity," and perhaps weakens a consistent pro-life attitude by appearing to be an active participant in the death penalty. The judge also weakens respect for the rule of law; if

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41. In *McClesky v. Kemp*, the Court held that "the Constitution is not offended by inconsistency in results based on the objective circumstances of the crime. Numerous legitimate factors [such as witness availability, credibility, and memory] influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt." *Kemp*, 481 U.S. 279, 307 n.28 (1987). The Constitution does not condemn the use of discretion in capital sentencing. *Id.* at 311. "Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense." *Id.* "Of course, 'the power to be lenient [also] is the power to discriminate' . . . but a capital punishment system that did not allow for discretionary acts of leniency 'would be totally alien to our notions of criminal justice.'" *Id.* at 312 (citing *Gregg v. Georgia*, 428 U.S. at 200 n.50).

42. BISHOPS' STATEMENT, *supra* note 9, ¶ 13.

others perceive the judge to be biased in this matter, they may assume that she is biased in others as well. And the judge arguably frustrates the democratic system that produced the death penalty legislation.

The benefits, on the other hand, are obvious and powerful. The judge who heeds the gospel of life will find for death only in very rare cases, and probably never. The lives of offenders will be preserved. This argument, of course, could be used to support judicial non-compliance where the jury determines and the judge imposes the sentence, but the cases are fundamentally different. In such a case, judicial non-compliance is a direct affront to the law: the law vests the judge with no discretion to reject the jury's verdict, and so a judge who refuses to impose the sentence usurps powers that have not been granted to her. In our case, however, the judge's bias toward life does not threaten the legal order; the law has given the judge the discretionary power that she exercises.

Garvey and Coney demonstrate great care for the consciences of Catholic judges, and show how they can reconcile their simultaneous commitments to the Church and the rule of law. To that admirable task, I raise only one question: is it possible, within the structure of Church teaching and the legal order, to reach another reconciliation that also enables the faithful judge to save the lives of some who might be condemned? Although it might have an "air of evasion" about it, I think we can answer "yes" in good conscience.